

**FILE COPY**

**VOLUME I**

**TRANSCRIPT OF RECORD**

---

---

**Supreme Court of the United States**

**OCTOBER TERM, 1960**

**No. 56**

---

**SAM FOX PUBLISHING COMPANY, INC., ET AL.,  
APPELLANTS,**

**vs.**

**UNITED STATES, ET AL.**

---

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF NEW YORK**

---

---

**FILED MARCH 14, 1960**

**PROBABLE JURISDICTION NOTED MAY 23, 1960**

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 56

SAM FOX PUBLISHING COMPANY, INC., ET AL.,  
APPELLANTS,

vs.

UNITED STATES, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF NEW YORK

## INDEX

	Original	Print
Record from the United States District Court for the Southern District of New York		
Extracts from docket entries .....	1	1
Complaint filed February 26, 1941 .....	5	8
Civil decree and judgment of March 4, 1941 .....	39	27
Amended final judgment of March 14, 1950 .....	50	35
Transcript of proceedings of June 19, 1959 .....	69	49
Appearances .....	69	49
Colloquy between Court and counsel .....	70	49
Transcript of proceedings of June 29, 1959 .....	93	62
Appearances .....	93	62
Colloquy between Court and counsel on issu- ance of rule to show cause .....	95	62
Order to show cause .....	118	75
Note re attachments pursuant to stipulation of counsel as to printing record .....	118a	76



	Original	Print
Record from the United States District Court for the Southern District of New York—Continued		
Affidavit of Arnold Saemann as to mailing documents .....	176	76
Note re Exhibit "A" pursuant to stipulation of counsel as to printing record .....	177	77
Exhibit "B"—Notice "To All Members of the Society" .....	179	79
Affidavit of Edward Rosenberg as to mailing documents .....	180	80
Exhibit "A"—Letter dated July 21, 1959 from Stanley Adams, President of ASCAP, "To All Members of the Society" .....	182	81
Applicant's notice of motion returnable September 1, 1959, for an order directing the plaintiff to answer "Interrogatories," the supporting affidavit of Herbert Cheyette dated August 25, 1959, the exhibits thereto and the memoranda endorsed on said motion by Chief Judge Ryan and Judge Dimock .....	183	101
Memorandum of the United States in support of proposed consent further amended final judgment and endorsement thereon .....	202	119
Affidavit of Arnold Saemann as to mailing documents .....	233	114
Exhibit "A"—Letter dated August 26, 1959 from President of ASCAP "To All Members of the Society" enclosing a copy of "Remarks by Mr. Arthur H. Dean at the West Coast Meeting of ASCAP on August 18, 1959" .....	236	149
Exhibit "B"—Letter dated September 4, 1959 from President of ASCAP "To All Members of the Society" enclosing a copy of "Remarks of Mr. Arthur H. Dean at the New York Meeting of ASCAP on August 27, 1959" .....	237	188
Exhibit "C"—Letter dated September 30, 1959 from President of ASCAP "To All Members of the Society" .....	238	229

Record from the United States District Court for  
the Southern District of New York—Continued  
Affidavit of Arnold Saemann as to mailing docu-  
ments—Continued

Exhibit "D"—Letter dated October 5, 1959 from President of ASCAP "To All Members of the Society" enclosing a "Memorandum for the information of members of ASCAP, with respect to the new survey put into effect on October 1, 1959"	239	230
Order amending document entitled "Weighting Formula" attached to the order to show cause of June 29, 1959	240	243
Affidavit of Arnold Saemann re mailings	246	246
Affidavit of William Strauss as to mailing docu- ments	247	247
Exhibit "A"—Letter dated October 9, 1959 from President of ASCAP to "All Members of the Society" enclosing memorandum of Arthur H. Dean with respect to an addition to the proposed weighting formula	249	248
Notice of motion and motion of Sam Fox Pub- lishing Company, Inc., et al., for permission to intervene	250	251
Exhibits to affidavits of Howard T. Milman, Herman Finkelstein and Richard F. Murray		
Exhibit 3—Letter dated August 5, 1959 from Acting Assistant Attorney General Bicks to Herman Finkelstein with enclosure	315	258
Exhibit 4—Letter dated September 4, 1959 from Sullivan & Cromwell to Herbert Cheyette	316	262
Exhibit 7—Letter dated September 16, 1959 from Sam Fox Publishing Company to Herman Finkelstein	319	268
Exhibit 8—Letter dated September 17, 1959 from Herman Finkelstein to Sam Fox Pub- lishing Company, Inc.	320	269
Exhibit 11—Letter dated September 28, 1959 from Sam Fox Publishing Company to Herman Finkelstein	323	270

Record from the United States District Court for  
the Southern District of New York—Continued

Exhibits to affidavits of Howard T. Milman,  
Herman Finkelstein and Richard F. Murray  
—Continued

Exhibit 12—Letter dated October 7, 1959 from Herman Finkelstein to Sam Fox Publishing Company	324	271
Exhibit 13—Letter dated September 30, 1959 from Pleasant Music Publishing Corp. to Herman Finkelstein	325	272
Exhibit 14—Letter dated October 7, 1959 from Herman Finkelstein to Pleasant Music Pub- lishing Corp. with enclosure	326	273
Exhibit 15—Letter dated October 13, 1959 from Pleasant Music Publishing Corp. to Herman Finkelstein	327	277
Exhibit 16—Letter dated October 16, 1959 from Herman Finkelstein to Pleasant Music Publishing Corp.	328	278
Exhibit 17—Letter dated August 19, 1959 from Southern Music Publishing Company, Inc. to American Society of Composers, Authors and Publishers	329	279
Exhibit 18—Letter dated August 26, 1959 from R. F. Murray to Southern Music Publishing Company, Inc. with attachments	330	279
Exhibit 19—Letter dated September 1, 1959 from Southern Music Publishing Company, Inc. to American Society of Composers, Au- thors and Publishers	331	283
Exhibit 20—Letter dated September 9, 1959 from R. F. Murray to Southern Music Pub- lishing Company, Inc. with attachments	332	284
Exhibit 21—Letter dated September 8, 1959 from Southern Music Publishing Company, Inc. to American Society of Composers, Au- thors and Publishers	333	290
Exhibit 22—Letter dated September 9, 1959 from R. F. Murray to Southern Music Pub- lishing Company, Inc.	334	291

# INDEX

v

Original Print

Record from the United States District Court for the Southern District of New York—Continued		
Transcript of proceedings of October 19 and 20, 1959 .....	337	291
Appearances .....	337	291
Colloquy between Court and counsel on mo- tions for leave to intervene and to be heard .....	398	292
Discussion of decree .....	355	301
Statement by Mr. O'Donnell .....	357	302
Mr. Bennett .....	402	325
Mr. Dean .....	442	345
Mr. Eastman .....	453	351
Mr. Horsky .....	477	365
Mr. Schaeffer .....	563	410
Mr. Fishbein .....	571	413
Mr. Zissu .....	593	424
Mr. Rothstein .....	595	425
Mr. Niles .....	618	437
Mr. Kaufman .....	624	441
Mr. Battle .....	629	443
Mr. Bradford .....	637	448
Mr. Evans .....	642	450
Mr. Freedman .....	643	451
Mr. Dean .....	647	453
Colloquy between Court and counsel .....	677	468
Statement by Mr. Davis .....	688	474
Colloquy between Court and counsel .....	692	476
Order denying motion of Sam Fox Publishing Company, Inc., for leave to intervene .....	718	489
Affidavit of Edward Rosenberg as to mailing documents .....	721	490
Exhibit "A"—Notice of November 2, 1959 by Secretary of ASCAP to "Members of the West Coast" advising of special meeting .....	724	493
Exhibit "B"—Notice of November 2, 1959 by Secretary of ASCAP to "All Members of the Society" advising of special meeting .....	725	495
Exhibit "C"—Letter dated November 2, 1959 from President of ASCAP to "Dear Fellow Member of ASCAP" .....	726	497

Record from the United States District Court for the Southern District of New York—Continued		
Affidavit of Edward Rosenberg as to mailing documents—Continued		
Exhibit "F"—Letter dated November 4, 1959 from President of ASCAP to "All Members of the Society" submitting proposed amend- ments to Articles of Association	729	501
Affidavit of Arnold Saemann as to mailing docu- ments	730	502
Note re Exhibit "A" pursuant to stipulation of counsel as to printing record	731	503
Order designating Jerome I. Golinko & Co., to assist in connection with voting	733	503
Annex "A"—Procedures to be followed by the direction of the Court	734	504
Exhibits to affidavits of Howard T. Milman, Her- man Finkelstein, Stanley Adams, Richard F. Murray, Bernard Korman, Natalie Kissel and Sylvia Rosenberg		
Exhibit 1—Letter dated October 27, 1959 from Arthur H. Dean to Charles A. Horsky	749	509
Exhibit 2—Letter dated October 29, 1959 from Charles A. Horsky to Arthur H. Dean	750	510
Exhibit 3—Letter dated December 2, 1959 from Arthur H. Dean to Charles Horsky	751	511
Exhibit 5—Letter dated December 14, 1959 from Charles A. Horsky to Arthur H. Dean	753	512
Exhibit 6—Letter dated December 18, 1959 from Arthur H. Dean to Charles A. Horsky	754	513
Exhibit 13—Letter dated October 27, 1959 from Arthur H. Dean to Bernard Kaufman	761	514
Exhibit 15—Letter dated October 27, 1959 from Arthur H. Dean to Guy Friedman	763	515
Exhibit 18—Letter dated November 6, 1959 from Arthur H. Dean to Guy Freedman	766	516
Exhibit 19—Letter dated November 4, 1959 from Arthur H. Dean to Edgar William Battle	767	517

# INDEX

vii

Original Print

Record from the United States District Court for the Southern District of New York—Continued Exhibits to affidavits of Howard T. Milman, Herman Finkelstein, Stanley Adams, Richard F. Murray, Bernard Korman, Natalie Kissel and Sylvia Rosenberg—Continued		
Exhibit 22—Letter dated November 4, 1959 from Sam Fox Publishing Company to Howard T. Milman	770	518
Exhibit 23—Letter dated November 6, 1959 from Howard T. Milman to Herbert Cheyette	771	520
Exhibit 24—Letter dated October 22, 1959 from Charles A. Horsky to Herman Finkelstein	772	521
Exhibit 26—Letter dated October 28, 1959 from Morton Schaeffer to Herman Finkelstein with attachment	774	522
Exhibit 29—Letter dated December 29, 1959 from Herman Finkelstein to Herbert Cheyette	777	527
Exhibit 31—Letter dated October 9, 1959 from G. Ricordi & Co. to Stanley Adams with attachments	779	528
Transcript of proceedings of January 6 and 7, 1960	791	536
Colloquy between Court, counsel and persons delegated to canvass ballots	792	536
Announcement of summary of votes	826	556
Colloquy between Court and counsel	836	560
Motion for approval of proposed consent decree	838	562
Statement by Mr. Rothstein	839	562
Mr. Horsky	854	570
Renewal of motion to intervene and denial thereof	864	576
Colloquy between Court and counsel	866	577
Statement by Mr. Anderson	872	580
Mr. Dean	878	583
Mr. O'Donnell	882	586
Mr. Zissu	883	586
Mr. Eastman	886	588
Colloquy between Court and counsel	895	589



	Original	Print
Record from the United States District Court for the Southern District of New York—Continued Court's Exhibit "A"—Affidavit of Herman Finkelstein .....	898	590
Clerk's note re Exhibits A and B .....	903	594
Exhibit "C"—Letter from ASCAP to "All Members" dated November 29, 1959 .....	905	596
Exhibit "D"—Official ballot .....	906	599
Exhibit "E"—Official ballot .....	907	601
Court's Exhibit "D"—Affidavit of Herman Finkelstein .....	917	603
Exhibit A-1—Undated letter from Vincent Lopez to "Dear Fellow ASCAP Member" .....	921	607
Exhibit C-1—Pamphlet from "Members for a fair ASCAP" .....	924	609
Exhibit C-2—Pamphlet from "Members for a fair ASCAP" .....	925	611
Exhibit D-1—Letter dated November 19, 1959 from The Current Writers Committee to "Dear Fellow Members of ASCAP" .....	926	612
Exhibit D-2—Excerpt from "The Billboard" of November 16, 1959 .....	927	615
Exhibit E-1—Undated letter from H. J. Lengsfelder to "Dear Fellow Member" .....	928	616
Exhibit F—Three-paragraph statement by Sam Fox Publishing Company, Inc. ....	931	619
Exhibit H—Letter dated November 24, 1959 from "Your Fellow-Writers" to "Dear ASCAP Member" .....	933	621
Exhibit I—Letter dated November 28, 1959 from Otto A. Harbach to "Dear Fellow Member of ASCAP" .....	934	622
Exhibit J—Letter dated November 27, 1959 from May Singhi Breen de Rose to "Dear Fellow Member" .....	935	623
Exhibit K—Letter dated November 24, 1959 from Stanley Adams to "All Members of the Society" enclosing a copy of Mr. Dean's remarks at West Coast Meeting and Mr. Adams' report .....	936	624

Record from the United States District Court for the Southern District of New York—Continued Court's Exhibit "D"—Affidavit of Herman Finkelstein—Continued		
Exhibit L—Letter dated November 30, 1959 from Stanley Adams to "All Members of the Society"	937	649
Exhibit M—Letter dated December 5, 1959 from Stanley Adams to "All Members of the Society"	938	650
Exhibit N-1—Letter dated December 3, 1959 from Stanley Adams to "Dear Fellow Member"	939	652
Exhibit N-2—Excerpt from "Variety" of December 2, 1959	940	653
Exhibit P—Letter dated December 4, 1959 from Herman Finkelstein to Sidney Rothstein	942	654
Court's Exhibit H—Summary of ASCAP balloting, dated January 1, 1960	956	655
Court's Exhibit K—Statement of Stanley Adams certifying that the consent of the membership to the Proposed Consent Further Amended Final Judgment had been given, dated January 6, 1960	957	656
Order adjudging that Article VII of the Proposed Consent Order has been complied with and the effective date of said Consent Order is January 7, 1960, entered January 7, 1960	958	657
Consent and order amending Proposed Further Amended Final Judgment attached to, show cause order dated June 29, 1959, entered January 7, 1960	960	659
Order appointing the Hon. John E. McGeehan and the Hon. Irving M. Ives to examine the survey, entered January 7, 1960	962	661
Opinion, Ryan, J.	964	662
Consent further amended final judgment	973	667
Notice of appeal to the Supreme Court of the United States	1030	714
Order postponing jurisdiction	1036	719
Stipulation dismissing appeal as to appellant Movie-tone Music Corp.	1037	719



[fol. 1]

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

UNITED STATES OF AMERICA

vs.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS & PUBLISHERS

June 29, 1959—February 8, 1960

EXTRACTS OF DOCKET ENTRIES

June	29, 1959	Filed	Show cause Order re: Approval of Consent further amended judgment:—ret. 10/19/59, Room 129, 10 A.M. (ASCAP to mail copy, etc.) Transcript of record of proceedings of June 19, 1959.
July	6, 1959	"	Consent Order re: License Agreement and Fee, etc. (See Order).—Ryan, J.
July	17, 1959	"	Affidavit of service of documents to all members of ASCAP, etc. by deponent American Society of Composers, etc.
August	13, 1959	"	Consent Order (Re: Background Music et al.). License fee found reasonable, etc.—Ryan J. Mailed notice of entry 8/12/59.
August	28, 1959	"	Affidavit and Notice of Motion (by Sam-Fox Publishing) for answers to interrogatory) returnable 9/1/59.
September	1, 1959	"	Memo Endorsed: Referred to Judge Ryan—Dimock J.

September	2, 1959	Filed	Filed Plaintiff's Memo in support of further amended judgment—Memo endorsed. Clerk directed to file within brief, etc.—Ryan J.
"	3, 1959	"	Transcript of Record of proceedings of June 29, 1959
"	3, 1959	"	Transcript of Record of proceeding of July 7, 1959.
"	2, 1959	"	2nd Memo endorsed: Adj'd at request of Government to 9/8/59 at 2:30 P.M.—Ryan, J.
"	8, 1959	"	3rd Memo endorsed: Motion withdrawn, etc. (see memo) So Ordered—Ryan, J.
"	21, 1959	"	Order—Society shall issue interim licenses as indicated in order—Ryan J. (see order).
October	7, 1959	"	Order on Consent approving license fees, etc. Ryan, J.
"	8, 1959	"	Consent Order Amending "Weighting Formula" attached to show cause dated 6/29/59 as indicated—Ryan, J.
"	7, 1959	"	Stipulation and Order amending Schedule A to amended appearance filed by McGoldrick, D. H. & G. of 2/26/59, etc.—Ryan J.
"	9, 1959	"	Affidavit of Arnold Saemann.
"	9, 1959	"	Affidavit of Edward Rosenberg.
[fol. 2]			
"	13, 1959	"	Affidavit and Notice of Motion by Sam Fox Publishing et al. to intervene ret. 10/19/59, 10 A.M. before Ryan, J.

October	16, 1959	Filed	Affidavit of mailing to ASCAP members.
November	16, 1959	"	Unsigned Order (H.C.).
"	16, 1959	"	Unsigned Order (H.C.) with letter attached.
"	16, 1959	"	Order denying motion of Sam Fox Publishing et al. for leave to intervene—Ryan, J.
"	18, 1959	"	Affidavit and Exhibit of Arnold Saemann of Service by mail of proposed Amendments to ASCAP Articles of Association, etc.
"	18, 1959	"	Affidavit of Edward Rosenberg of Service by mail of copies of Exhibit A to F as attached hereto.
"	20, 1959	"	<del>Petition for licenses</del> for right of public performance of compositions in ASCAP repertory by radio and television stations in State of Washington, etc.
"	20, 1959	"	Exhibit and Order directing issuance of licenses to petitioners for their respective radio stations in State of Washington, etc. Ryan, J.
"	20, 1959	"	Stipulation on issuance of license by respondent as indicated.
"	27, 1959	"	Exhibit & Order designating Jerime I. Golinko & Co. to assist Mr. Herman Finkelstein on vote of members on proposed consent orders per their amending amended final judgment entered 3/14/50 as set forth in Ex. A hereto—Ryan, J.

November 30, 1959	Filed		Affidavit & Exhibits A, B, C, D of Arnold Saemann of service by mail.
December 17, 1959	"		Affidavit & Exhibits of Herman Finkelstein and Aaron A. Map-pen on ballots.
January 5, 1960	"		Affidavit of Howard T. Milman et al. re letters as per exhibit annexed.
" 5, 1960	"		Affidavit of Herman Finkelstein re deductions of advertising agency commissions.
" 5, 1960	"		Affidavit of Herman Finkelstein re acquainting court on issues for conference.
" 5, 1960	"		Affidavit of Emanuel Dannett re in opposition to Herman Finkelstein's affidavit.
" 5, 1960	"		Herman Finkelstein affidavit.
" 5, 1960	"		Affidavit of Hal David re constituting the Current Writers Comm.
[fol. 3]			
" 5, 1960	"		Stip. & Order adding and dropping parties in Schedule A. annexed to amended appearance entered 2/28/59 & final order not to apply to 2 petitioners listed in Schedule B—Ryan, J.
" 5, 1960	"		Final order approving forms of license agreement for a term of 5 years commencing January 1, 1959 as per Exhibit "I" and "2" annexed and comply with terms of amended final judgment, etc—Ryan, J.

January	7, 1960	Filed	Affidavit of Herman Finkelstein pursuant to Court instructions on hearing held 10/20/59 (pages 355-361 of minutes) marked Exhibit "D".
"	7, 1960	"	Oath of Tellers, Reinhold Dreher, et al. marked Exhibit "F".
"	7, 1960	"	Affidavit of Herman Finkelstein with respect to receipt and handling of ballots marked Exhibit "B".
"	7, 1960	"	Copy of affidavit of Herman Finkelstein marked Exhibit "A" pursuant to court's instructions on pages 353-354 on minutes of hearing held 10/20/59.
"	<del>7, 1960</del>	"	<del>Memo of proposed tabulating procedure to be followed in Court 1/6/60 marked Exhibit "C".</del>
"	7, 1960	"	Telegram from Bob Davis to Judge Ryan dated 1/6/60 marked Exhibit "E".
"	7, 1960	"	Exhibit "G"—Summary of AS-CAP Balloting.
"	7, 1960	"	Exhibit "H"—Summary of AS-CAP Balloting.
"	7, 1960	"	Exhibit "I"—Tabulation sheets on vote—Count 1.
"	7, 1960	"	Exhibit "J"—Tabulation Sheets on vote—Count 2.
"	7, 1960	"	Exhibit "K"—Certification by ASCAP of submission of proposed consent further amended final judgment.
"	7, 1960	"	Application for determination of a reasonable fee.

January	7, 1960	Filed	Affidavit of Howard T. Milman & Exhibits.
"	7, 1960	"	<del>Affidavit and notice of motion to determine reasonable fee returnable 7/7/59.</del>
July	7, 1959	"	Memorandum Endorsed on notice of motion filed 1/7/60 dismissing this part of proceeding—Ryan, J.
January	7, 1960	"	Second Memorandum endorsed on Notice of Motion filed 7/7/59—matter having been settled attached petition withdrawn. So ordered—Ryan, J.
"	7, 1960	"	Order adjudging that Article VII of proposed consent order has been complied with and effective date of said consent order is 1/7/60—Ryan, J.
[fol. 4]			
"	7, 1960	"	Order directing tabulations and ballots be sealed in appropriate containers, etc.—Ryan, J.
"	7, 1960	"	Consent Order amending proposed consent further amended Final Judgment attached to show cause order dated 6/29/59 as indicated herein.—Ryan, J.
"	7, 1960	"	Order appointing Hon. John E. McGeehan and Honorable Irving M. Ives to examine the design and conduct of survey in Sec. II of consent order and report and ASCAP to pay reasonable expenses and salaries—Ryan, J.
"	7, 1960	"	Consent and Order on issues of Fact or Law on Amended Final Judgment—Ryan, J.

January	15, 1960	Filed	Filed transcript of record of proceeding for Jan. 6, 7, 1960.
"	7, 1960	"	Filed Opinion #25676 to sign proposed consent decree further Amending the amended final consent judgment entered 3/14/50 (which amended the final consent judgment of 3/4/41)—Ryan, J.
"	29, 1960	"	Plaintiff's cross-designation.
February	1, 1960	"	Defendant ASCAP cross-designation.
January	14, 1960	"	Notice of Appeal of Sam Fox Publishing Co. Inc. et al. from order of 11/16/59 denying intervention to Supreme Court of United States.
February	8, 1960	"	Affidavit & Order directing Clerk to transmit to Clerk of Supreme Court of United States all of original papers specified in designations of applicants in Intervention and plaintiff and defendant as contained in their notice of appeals and cross-designation, etc.—Ryan, J.



[fol. 5]

IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF NEW YORK  
Civil Action No. 13-95

---

UNITED STATES OF AMERICA, Complainant

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND  
PUBLISHERS, ET AL., Defendants

---

COMPLAINT—Filed February 26, 1941

The United States of America, by Matthis F. Correa, its attorney for the Southern District of New York, Thurman Arnold, Assistant Attorney General, Victor O. Waters, Special Assistant to the Attorney General, and Warren P. Cunningham, Special Attorney, acting under the direction of the Attorney General, files this its petition in equity against the following named defendants and for cause of action alleges:

I

Description of Defendants

1. That American Society of Composers, Authors and Publishers, hereinafter referred to as "Society," an unincorporated membership association of music composers, authors and publishers, which has its principal office at 30 Rockefeller Plaza, New York, New York, is made a defendant herein.

[fol. 6] 2. That Gene Buck, president, George W. Meyer, secretary, and Gustave Schirmer, treasurer, of the American Society of Composers, Authors and Publishers, during the times hereinafter mentioned, who have been or are now active in the management of the Society, or in the direction of the activities hereinafter described, are made defendants herein.



3. That the members of the Society, other than those members thereof specifically named herein constitute a group so numerous that it would be impractical to bring all of them on before the Court by name; therefore, the aforesaid defendants named and described herein are sued as representing all members of the Society.

## II

### The Society

4. That defendant Society, an unincorporated association, was organized in or about the year 1914, by the leading publishers, composers and authors of musical compositions in the United States, for a period of ninety-nine (99) years from the date of its organization; that the purposes for which it was organized were, among other things, to grant licenses and collect royalties for the public performance of the works of its members, to allot and distribute the royalties collected, and to accumulate and maintain a reserve fund to be used in carrying out any of the objects of the Society; that its membership at the time of the filing of this Complaint consists of approximately 140 publishers and 1,200 composers and authors and includes the owners of the copyrights of a substantial amount, more than 75 percent of all the copyrighted musical compositions demanded by the public of the United States for entertainment purposes at the time of the filing of this [fol. 7] Complaint and for a number of years prior thereto; that the management of defendant Society is vested exclusively in a self-perpetuating board of directors consisting of 24 persons, 12 of whom represent publisher members, 6 represent composer members, and 6 represent author members; that each director is elected to serve for a period of three years, and is eligible for reelection upon the expiration of his term; that the terms of office of eight members of said board expire each year, and their successors are elected annually by the remaining members of the board; that the directors have exclusive and absolute control of the management and of all activities of the Society and appoint all its committees, officers and employees; that admission to membership in the Society is by

election thereto by the board; that each member upon admission must execute an agreement in the form required by the board of directors, assigning to the Society the exclusive nondramatic public performance for profit rights of all of the members' works for the period of any then existing agreement between the Society and its members; that by reason of the vast number of copyrights of compositions controlled by the members of the Society, by reason of the great public demand therefor, and by reason of the vesting of the absolute management and control of all activities of the Society in the self-perpetuating board of directors, the twenty-four persons constituting such board have the power to and do fix the price of and control the public performance for profit rights of the greater part of the music demanded by the public of the United States for entertainment purposes.

5. That licenses to perform publicly for profit the musical compositions copyrighted by its members are issued by the Society upon application therefor; that agents of [fol. 8] the Society solicit applications for such licenses by threat of prosecution for infringement of the copyright laws of the United States, from all unlicensed persons, firms or corporations in the United States who use music in connection with their business; that defendant Society refuses to grant licenses to perform single musical compositions or groups of compositions selected by the licensees; that it grants only blanket licenses to perform any and all musical compositions of all its members upon the payment of such royalty as is demanded by the board of directors of the Society.

6. That defendant Society maintains agents and representatives throughout the United States, whose duty it is to enforce the demands of the Society in the sale of licenses and in collecting royalties therefor.

### III

#### The Radio Broadcasting Industry

7. That the term "radio broadcasting station" is used herein to designate those radio stations operated for the

entertainment of the residents of the United States and residents of adjacent and more distant foreign countries; that there are approximately 793 such radio broadcasting stations interspersed throughout the states of the United States and operated under authority of the Federal Communications Commission, pursuant to the Act of Congress known as the Communications Act of 1934, approved June 19, 1934, and prior Acts of Congress; that each station is required to broadcast a minimum regular operating schedule of two-thirds of the hours it is authorized to broadcast under the license granted it by the Communications Commission; that the continued existence, success and [fol. 9] prosperity of a radio broadcasting station depends entirely upon the entertainment offered by it to the radio listening public within the range of the station's power; that music is the principal form of entertainment demanded by the radio listening public and must be offered by a station in order to retain the continuing interest and patronage of the listening public; that approximately 50 percent of the time devoted to the transmission of energy, ideas and entertainment across state or national boundaries by radio broadcasting stations in the United States is devoted to the radio broadcasting of music in varying forms, and such music must represent the rendition of compositions most desired by the listening public; that the only income available to a station is derived from the sale of its facilities to persons desiring to communicate energy, ideas and entertainment to the public within listening range of the station's transmission power; that such sale of facilities consists primarily of sales to business concerns for the purpose of advertising the products of the particular concern and of creating good will on the part of the public for the services or products of the advertiser; that the desirability of a particular station for advertising purposes is directly dependent upon the number of persons listening to the programs broadcast by that station, and such persons can only be induced to listen to the station's broadcasts by furnishing the musical entertainment demanded by the radio audience; that a substantial portion of the entertainment furnished by the station must be

furnished at the expense of the station, for which it receives no compensation or income.

8. That during all the time herein mentioned it has been and is essential to the continued operation of each of the [fol. 10] stations in the United States broadcasting radio entertainment, in order to avoid liability for infringement of copyright, to obtain the permission or license of the owners of the copyrighted musical compositions the public performance of which is demanded by the radio audience.

#### IV

#### The Interstate Commerce Involved

##### A. In radio broadcasting

9. That radio broadcasting stations in the United States are engaged in interstate or foreign commerce; that each station is an instrumentality through which energy, ideas and entertainment are transmitted across state or national boundaries to the radio listening population of the United States or foreign countries; that approximately 40 percent of the time devoted to the transmission of energy, ideas and entertainment across state or national boundaries by radio broadcasting stations in the United States has been devoted to the radio broadcasting of copyrighted musical compositions owned or controlled by the Society and its members; that as each radio station under the copyright laws must obtain permission from the copyright owners of musical compositions before such compositions can be broadcast in interstate commerce, any interference with or restraint upon the obtaining of such permission from the copyright owners upon a competitive basis restrains the interstate and foreign transmission of energy, ideas and entertainment by radio broadcasting stations.

10. That there has developed in the radio industry a practice which is commonly called "chain" or "network" broadcasting; that by this method of operation several radio broadcasting stations are connected in a chain or [fol. 11] network by means of leased telephone lines for the purpose of broadcasting simultaneously radio programs

originating at one of the stations in the network; that this method is generally inaugurated and controlled by what is known as a network company; that the principal network companies presently existing in this country are the National Broadcasting Company, the Columbia Broadcasting System, and the Mutual Broadcasting System; that approximately 350 radio stations located in the United States are affiliated with and engaged in such "network" broadcasting; that only those network stations which originate network programs have control over the selection of the content of the programs which are broadcast simultaneously by all of the stations in the network; that approximately 45 percent of the total time devoted to network broadcasting in this country is devoted to the broadcasting of musical compositions; that a substantial number of the copyrighted musical compositions performed over radio networks during the period covered by the Complaint were owned or controlled by the Society and its members; that the network stations other than those originating network broadcasting have no control whatsoever over the selection of the musical compositions which are performed by the several stations comprising the network.

#### B. In sheet music

11. That each defendant who is a publisher member of defendant Society prints, or causes to be printed, the music and lyrics, and special arrangements thereof, of musical compositions; that such printed sheets of music are sold by such defendants to customers located in all states of the United States and are transported across state [fol. 12] boundaries in interstate commerce; that the greater part of the musical compositions broadcast by radio stations is performed by entertainers located in the studio of particular broadcasting stations, or in close proximity thereto, from musical scores transported across state boundaries.

12. That the essential element in effecting the sale and distribution of sheet music throughout the United States is the transmitting of musical compositions to the ear of the public; in order to create a desire on the part of in-



dividual members of the public to purchase the printed score representing particular compositions; that radio broadcasting is the principal medium through which individual musical compositions are transmitted to the ear of the purchasing public and a demand for the printed score created; that by means of the combination and conspiracy hereinafter described, defendant Society through the issuance of only blanket licenses authorizing the performance of the Society's entire repertoire of music at a price which requires the payment of a percentage of the revenue derived from all radio programs regardless of whether Society owned or controlled music is performed, has destroyed the economic incentive on the part of radio stations, having the Society's license, to perform the musical compositions of authors, composers and publishers not members of Society, thereby depriving those owners of copyrighted musical compositions who are not members of defendant Society of the opportunity of transmitting their musical compositions to the ear of the purchasing public, with the result that the sale of scores written by nonmembers to purchasers in states of the United States other than the state where such scores were manufactured, and the transportation thereof across state and national boundaries, is and has been restrained.

[fol. 13]

### C. Motion picture films

13. That motion picture films are produced primarily in the States of New York and California, and shipped to motion picture exhibitors located in every state in the United States; that these motion picture films are produced and shipped in interstate commerce for the sole and exclusive purpose of exhibition or public performance by motion picture exhibitors; that without the right to exhibit or perform, the motion picture films are rendered valueless and restricted from a free flow in interstate commerce; that a substantial portion of the motion picture films are synchronized with music to the extent that the films cannot be exhibited without performing the music synchronized therewith; that a great majority of the music synchronized with the films is copyrighted music, the public performance

for profit rights of which are controlled by the Society; that the Society, therefore, has the power to fix the price of, control or otherwise unreasonably restrain the usage of a substantial portion of the motion picture films passing in interstate commerce.

#### D. Electrical transcriptions

14. That electrical transcriptions are mechanical devices upon which programs are recorded or mechanically reproduced for the exclusive use of radio broadcasting stations; that more than 50 percent of the electrical transcriptions produced in the United States are produced or manufactured in the States of New York and California and shipped to radio broadcasting stations located throughout the United States; that upon practically all of these [fol. 14] electrical transcriptions are recorded musical compositions; that a substantial portion of the music so recorded is copyrighted music owned or controlled by the Society and its members.

### V

#### The Combination and Conspiracy

15. That for many years preceding as well as during the period of three years next preceding the filing of this Complaint, and continuing to the date of the filing thereof, defendants, and others to the United States Attorney unknown, well knowing the foregoing facts, have been engaged in the United States, and particularly in the Southern District of New York, in a wrongful and unlawful combination and conspiracy in restraint of the aforesaid interstate and foreign trade and commerce in radio broadcasting, sheet music, motion picture films, and electrical transcriptions in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" (U.S.C.A., Title 15, Section 1), commonly known as the Sherman Act, and have conspired to do all acts and things and to use all means necessary and appropriate to make said restraints effective, including the means, acts and things hereinafter more particularly alleged and other

means, acts and things which at the time of filing this Complaint are unknown to the United States Attorney; that as a part of said conspiracy the defendants have arranged and agreed among themselves to do the following things.

A. To create, maintain and utilize defendant Society as an instrumentality for promoting and maintaining the illegal combination and conspiracy herein described; to create defendant Society as such instrumentality with [fol. 15] a self-perpetuating board of directors and to vest in the twenty-four persons constituting such board the exclusive power to control the activities of defendant Society; to restrict membership in defendant Society to such composers and authors who have written or composed and had regularly published not less than five copyrighted musical compositions, and to such publishers as may be approved by the board of directors; to have transferred to and to pool in defendant Society the sole and exclusive right to perform publicly for profit all musical compositions of which all the members of Society are the copyright proprietors, or which any member, either alone or jointly or in collaboration with others, wrote, composed, published, acquired or owned, or in which any member has any right, title, interest, or control whatsoever, in whole or in part, or which any member during the term of the agreement may write, compose, acquire, own, publish or copyright, either alone, jointly, or in collaboration with others, or in which any member may at any time, during the term of the agreement, have any right, title, interest or control, either in whole or in part; to have all members of defendant Society vest in defendant Society absolutely until and including December 31, 1940, the sole and exclusive right to license others to perform publicly for profit all their musical compositions; to renew and extend the agreements between Society and its members which expired December 31, 1940, for a further ten-year period.

B. To vest in defendant Society a complete monopoly of the right to license for public performance for profit all the musical compositions of all its members, aggregating an unknown number of musical compositions; to refuse



to furnish to its licensees complete lists of the musical [fol. 16] compositions in the Society's repertoire of music; to eliminate competition among members of defendant Society in the sale of rights to perform publicly their respective musical compositions, which, but for the illegal combination and conspiracy herein described, would have existed; to refuse radio broadcasting stations, advertisers (desiring to utilize the service of such stations to promote the sale of their merchandise), orchestras, theatres, and others desiring the right to perform publicly the copyrighted musical compositions of members of defendant Society, the right to acquire from the individual members of the Society the public performance for profit rights of their respective copyrighted musical compositions; to require commercial users desiring only certain musical compositions in the Society's repertoire to accept a blanket license from defendant Society for all of its copyrighted musical compositions, upon terms and conditions arbitrarily fixed by it.

C. To agree to establish and maintain, and pursuant to such agreement, to establish and maintain, by means of the pooling of their individual copyright monopolies, enhanced and non-competitive prices or royalties for licenses to perform publicly copyrighted musical compositions owned and controlled by individual defendants; to eliminate all competition among members of defendant Society in the sale of licenses to perform publicly their individual musical compositions and to exercise the power obtained by defendants through the unlawful pooling of their individual copyright monopolies, by concertedly refusing to license the public performance by radio broadcasting stations and all other persons engaged in the public performance for profit of copyrighted music of any copyrighted musical composition owned and controlled by a member of defendant Society, except on the basis of a [fol. 17] general license covering any and all musical compositions of all members and except upon the basis of an arbitrary royalty for such general license, fixed and determined by the aforesaid self-perpetuating board of directors of defendant Society; to require compliance with

the terms fixed by the defendants by radio broadcasting stations affiliated with radio "networks," prior to December 31, 1940, by issuing licenses to network affiliated radio stations only on the basis that the license issued to each station was not to be construed as authorizing the licensee to grant others any right to perform publicly for profit by any means, method or process whatsoever. The radio stations affiliated with a radio "network," other than the station originating the radio program, have had no control over the copyrighted musical compositions performed by the network affiliated stations simultaneously. Broadcasting stations affiliated with radio "networks" have had to accept a license from defendant Society upon any terms and conditions imposed by defendant Society, or subject themselves to numerous infringement suits in which they would be compelled to pay not less than \$250 for each copyright infringement, as provided in the copyright laws of the United States.

D. Concertedly to demand and receive from radio broadcasting stations increased amounts as royalties for licenses to perform publicly copyrighted musical compositions owned and controlled by members of defendant Society; to notify on or about April 1, 1932, all radio broadcasting stations throughout the United States that, on and after June 1, 1932, defendant Society would issue to broadcasting stations only a general license covering all musical compositions of all members of defendant Society, which license [fol. 18] would require the payment annually as royalty of a sum approximately equal to the annual royalty theretofore paid by them, and in addition thereto, 5 percent of the gross income of the broadcasting station from whatever source derived. This fee represented an increase of approximately 400 percent in so-called "royalty" payments over the aggregate royalty demanded for the previous year. Protests were made by the broadcasting stations to defendant Society and the then existing licenses were temporarily extended to September 1932. Thereupon efforts were made by the broadcasting stations, acting through a committee appointed for the purpose, to obtain licenses providing for royalty payments by each station.

based on the number of performances by such station of copyrighted musical compositions owned and controlled by Society or its members. The defendants refused to agree to royalty payments based on actual use made of their musical compositions. Other proposals submitted by the broadcasting stations were also rejected by defendants. Each broadcasting station, in order to use the copyrighted musical compositions controlled by defendant Society and to avoid a multiplicity of infringement suits, acceded to the demands of defendant Society and accepted from defendant Society a three-year blanket license agreement, commencing on or about September, 1932, covering all musical compositions of all members of defendant Society, upon the basis of a royalty payment approximately equal to the fixed annual royalty paid for the preceding year, plus three percent of the station's net receipts during the first year of the agreement, four percent of such receipts during the second year, and five percent of such receipts during the third year. "Net receipts" as defined in said agreement, constituted the full amount paid to the station [fol. 19] for the use of its broadcasting facilities, after deducting commissions not exceeding fifteen percent, if any, paid to an independent advertising agent or agency.

E. To refuse to alter or change the terms of the contracts executed by and between the Society and radio broadcasting stations in 1932, which expired December 31, 1935; and to issue an ultimatum on or about January 10, 1936, in writing, to the various radio broadcasting stations to the effect that the performance of copyrighted musical compositions in the Society's repertoire of music would constitute a copyright infringement unless the existing contracts were renewed by January 15, 1936. The radio broadcasters located throughout the United States had no alternative but to accept the terms dictated by the Society, since they could not operate without being subjected to the \$250 minimum damage provision for each copyright infringement of the copyright laws by performing music owned or controlled by the Society and its members. Within the specified time they accepted renewals of the contracts executed in 1932. These contracts executed in 1932, expired on December 31, 1940.

F. To refuse to renew the licenses to radio broadcasters which expired December 31, 1940, under threat of withdrawing from the interstate commerce of radio broadcasting and public enjoyment the vast pool of copyrighted music acquired by the Society, by means of the illegal conspiracy alleged herein and under the further threat of inflicting the \$250 minimum damage provision of the copyright laws, unless the radio broadcasters accepted the licenses tendered to them by Society. The percentage of income demanded by members of defendant Society from radio broadcasting stations since 1932, represents a percentage of the entire [fol. 20] income received by such broadcasting stations for the sale to advertisers of their operating time on the air. Such demand for the payment of these percentages constitutes a charge upon income received by radio broadcasting stations for their time devoted to the broadcasting of lectures, dramatizations, sporting events, and other programs, which employ none of the copyrighted musical compositions of the members of defendant Society.

G. To withdraw on January 1, 1941, from approximately 568 radio broadcasting stations interspersed throughout the United States, including the three national network systems, National Broadcasting Company, Columbia Broadcasting System and Mutual Broadcasting System, who had not accepted a license at the price and terms fixed by the defendants, the right to broadcast in interstate commerce and to deprive the radio listening public of the privilege of hearing and enjoying all the copyrighted music of all the respective members of the Society.

H. To create and maintain, prior to December 31, 1940, a distinction and discrimination between the license agreements exacted of radio broadcasting stations owned at least 51 percent by newspapers and license agreements exacted from radio broadcasting stations not so owned. The license agreement offered by defendant Society to broadcasting stations owned 51 percent by newspapers, and accepted by many, did not require payment to defendant Society of a percentage of the station's income derived from all advertisers, but only required the payment of 3 percent of the income of the station received from

advertisers whose programs included musical compositions owned or controlled by members of defendant Society. This 3 percent was payable until the total amount paid by the [fol. 21] station equalled an amount agreed upon between the station and defendant Society. Thereafter, the station was required to pay 5 percent of all additional income received by it from programs in which musical compositions owned or controlled by members of defendant Society were used.

I. To insert provisions or terms in all the license agreements to users of music which permit the copyright owner, through defendant Society, to withdraw at will from the operation of the license any musical compositions owned or controlled by such copyright owner and thereby prevent its broadcast by the broadcasting station, thereby enabling members of defendant Society to withdraw musical compositions in the Society's repertoire in great demand by the general public, for the purpose of collecting additional compensation for the right to perform publicly for profit and for the further purpose of collecting enhanced and non-competitive fees for the right to record and reproduce mechanically copyrighted musical compositions reproduced for public performance for profit; and to force radio broadcasting stations to accept all terms and conditions imposed by members of defendant Society for the right to broadcast popular musical compositions which have been withdrawn from the Society's general licenses.

J. To require radio broadcasting stations to accept a blanket license as heretofore stated upon terms and conditions imposed by defendant Society, thereby securing for members of the Society the exclusive use of radio broadcasting as a means of conveying musical compositions to the ear of the public-at-large, destroying the economic incentive of broadcasting stations to use the musical compositions of composers, authors and publishers who are not [fol. 22] members of defendant Society and thereby preventing non-members of defendant Society from receiving the compensation for the rights of public performance of their musical compositions, which they would otherwise receive, and limiting and restricting the popular demand



of the listening public to musical compositions controlled by defendant Society.

K. To require acceptance of their arbitrary and non-competitive demands for royalties by all classes of music users, as a condition precedent to the acquisition by such music users of the right to perform any copyrighted musical compositions of any members of the Society publicly for profit. The motion picture exhibitors interspersed throughout the United States must perform those musical compositions synchronized with the motion picture films in order to exhibit the motion picture films. Without the right to exhibit and perform the musical compositions synchronized therewith, the motion picture films received in interstate commerce are valueless. All users of music must perform those musical compositions demanded by their audiences. The limitation and restriction of popular demand to the musical compositions controlled by defendant Society has forced such users of music to obtain from defendant Society a license to perform music controlled by defendant Society so demanded by the public. The members of defendant Society, through defendant Society, have concertedly refused to grant such users permission to perform individual musical compositions selected by the users, but have insisted and still insist that general licenses be accepted which cover all the musical compositions of all the members of defendant Society, upon payment of a fixed amount therefor, irrespective of whether one or more of such musical compositions are actually performed. By this method of [fol. 23] licensing the members of defendant Society have further restricted the popular demand to those musical compositions owned or controlled by the members of defendant Society, and, have prevented the use of musical compositions owned by non-members of defendant Society.

L. To prevent the sale and transportation in interstate commerce of musical scores owned by composers, authors and publishers who are not members of defendant Society, by refusing to issue licenses for the public performance of musical compositions owned or controlled by them, except upon the terms and conditions above set forth.

M. To adopt and maintain a comprehensive system for the acquiring of detailed and complete information relative to the musical compositions used by broadcasting stations, by means of which information the members of defendant Society have been and are enabled to conduct their operations through defendant Society so as to prevent the development of competition between members of defendant Society and owners of copyrighted musical compositions who are not members of defendant Society, and to maintain and enforce all provisions of the licenses between Society and radio broadcasting stations.

## VI

### Purpose and Effect of the Conspiracy

16. That the defendants have adopted the means and engaged in the activities aforesaid, with the intent, purpose, and effect of unreasonably and unlawfully maintaining enhanced and uniform prices in the interstate commerce in copyrighted musical compositions controlled by Society, and have otherwise restrained unreasonably the interstate [fol. 24] commerce of radio broadcasting, sheet music, motion picture films, and electrical transcriptions; that all members of defendant Society, through the mutual and identical agreements hereinbefore described, have actively and effectively restrained their own activities, have eliminated competition among themselves, and have created, maintained and utilized defendant Society as an instrumentality unreasonably to restrain and restrict, directly and indirectly the interstate trade and commerce, as hereinbefore described.

## VII

### Jurisdiction and Venue

17. That the combination and conspiracy herein set forth has operated and has been carried out in part within the Southern District of New York, and many of the unlawful acts pursuant thereto have been performed by defendants and their representatives in said District; that the interstate trade and commerce in radio broadcasting, sheet music,

motion picture films and electrical transcriptions as herein described, is carried on in part within said District; that said defendants have usual places of business in the said District and therein transact business and are within the jurisdiction of the Court.

18. That this Complaint is filed and the jurisdiction of this Court is invoked against defendants American Society of Composers, Authors and Publishers, its officers and directors, and the members thereof, because of their violations, jointly and severally, as herein alleged, of Section 1 of the Sherman Act, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies."

[fol. 25]

## VIII

### Prayer

Wherefore, Complainant Prays:

19. That a writ of subpoena issue, directed to defendants named herein, demanding said defendants to appear herein and answer the allegations contained in this Complaint; that the combinations, conspiracies, agreements, and activities of defendants described in this Complaint be declared to constitute a conspiracy in restraint of interstate and foreign trade and commerce, and to be illegal and in violation of the Act of Congress approved July 2, 1890, known as the Sherman Antitrust Act; that the defendant Society and each and all of its respective officers, managers, agents, employees, members, and all persons acting or claiming to act on behalf of defendants be enjoined and restrained from entering into any contract, agreement, conspiracy, or otherwise do the following acts and things:

(1) From acquiring or asserting any exclusive performing right as agent, trustee or otherwise on behalf of any copyright owner or other owner of the performing right, with respect to any copyrighted musical composition not owned by Society.

(2) From exercising any right or power to restrict musical compositions in the defendant Society's catalogue of



music from public performance for profit by licensees of defendant for the purpose of regulating or fixing the price of recordation fees with respect to said musical compositions.

(3) From refusing to issue public performance for profit licenses authorizing the performance of specified musical [fol. 26] compositions owned or controlled by defendant Society.

(4) From refusing to issue licenses authorizing the public performance for profit of copyrighted musical compositions in defendants' catalogue of music upon terms and conditions which do not require the payment of a percentage of the gross receipts derived from radio programs on which no copyrighted musical compositions owned or controlled by the defendant, Society, are performed.

(5) From issuing licenses authorizing the public performance for profit of any musical composition or compositions other than on a basis whereby, insofar as network radio broadcasting is concerned, the issuance of a single license authorizing and fixing a single license fee for such performance by network radio broadcasting shall permit the simultaneous broadcasting of such performance by all stations on the network which shall broadcast such performance, without requiring separate licenses for such several stations for such performance.

(6) From refusing to license the public performance for profit by designated radio broadcasting stations, of any musical composition in defendant Society's catalogue of musical compositions licensed for radio broadcasting which is or shall be lawfully recorded on an electrical transcription or other recordation intended for broadcasting purposes, by a single license to any manufacturer, producer or distributor of such transcription or recordation or to any advertiser or advertising agency on whose behalf such transcription or recordation shall have been made who may request such license which single license shall authorize the broadcasting of the recorded composition or compositions by means of such transcription or recordation by all radio

stations enumerated by the licensee, without requiring separate [fol. 27] rate licenses for such enumerated stations.

(7) From entering into any licensing agreement with any user of music which discriminates in price or terms between different users similarly situated.

(8) From electing the members of the Board of Directors of the Society in any manner other than by a membership vote in which all author, composer and publisher members shall have the right to vote for their respective representatives to serve on the Board of Directors.

(9) From distributing to its members the moneys received by granting the right to perform copyrighted musical compositions publicly for profit on any basis other than the number, nature, character and prestige of the copyrighted musical compositions composed, written or published by each member, the length of time in which the works of the member have been a part of the catalogue of the Society, and popularity and vogue of such works, all to be determined in a fair and non-discriminatory manner.

(10) From requiring, as a condition precedent to eligibility for author or composer membership in the Society the regular publication of more than one musical composition or writing by any person who regularly practices the profession of writing music and the text or lyrics of musical works.

20. That plaintiff have such other and further relief as to the Court may seem proper and that plaintiff recover its costs.

Dated: February 26, 1941.

Victor O. Waters, Special Assistant to the Attorney General. Warren Cunningham, Jr., Special Attorney.

Thurman Arnold, Assistant Attorney General. Matthis F. Correa, United States Attorney.

[fol. 39]

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

Term, 1941

Civil Action File No. 13-95

UNITED STATES OF AMERICA, Plaintiff,

—v.—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS:  
 GENE BUCK, PRESIDENT; GEORGE W. MEYER, SECRETARY:  
 and GUSTAVE SCHIRMER, TREASURER, Defendants.

## CIVIL DECREE AND JUDGMENT—March 4, 1941

This cause came on to be heard on this 3rd day of March, 1941, the plaintiff being represented by Thurman Arnold, Assistant Attorney General, Victor O. Waters, Special Assistant to the Attorney General, and Warren Cunningham, Jr., Special Attorney, and the defendants being represented by their counsel, and having appeared and filed their answer to the complaint herein.

It appears to the Court that defendants herein have consented in writing to the making and entering of this decree, without any findings of fact, upon condition that neither such consent nor this decree shall be construed as an admission or adjudication that said defendants have violated any law.

[fol. 40] It further appears to the Court that this decree will provide suitable relief concerning the matters alleged in the complaint filed herein and that by reason of the aforesaid consent of defendants and its acceptance by plaintiff it is unnecessary to proceed with the trial of the action, or to take testimony therein, or that any adjudication be made of the facts.

Now, Therefore, Upon motion of plaintiff, and in accordance with said consent, it is hereby

## Ordered, Adjudged and Decreed

I. The Court has jurisdiction of the subject-matter set forth in the complaint and of the parties hereto with full power and authority to enter this decree and the complaint states a cause of action against the defendants under the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" and the acts amendatory thereof and supplemental thereto.

II. Defendants, Gene Buck, as President of the American Society of Composers, Authors and Publishers; George W. Meyer, Secretary; Gustave Schirmer, Treasurer; and American Society of Composers, Authors, and Publishers, its officers, directors, agents, servants, employees, members, and all persons acting or claiming to act on its behalf are hereby perpetually enjoined and restrained from entering into or carrying out, directly or indirectly, any combination or conspiracy to restrain interstate trade and commerce, as alleged in the complaint, by doing, performing, agreeing upon, entering upon or carrying out any of the [fol. 41] acts or things hereinafter in this paragraph II prohibited.

(1) Defendant, American Society of Composers, Authors and Publishers, shall not, with respect to any musical composition, acquire or assert any exclusive performing right as agent, trustee or otherwise on behalf of any copyright owner, its members, or other owner of the performing right, or pursuant to any understanding or agreement with such owner, or its members, to pay for such right a share of, or an amount measured by, the receipts or revenues of said defendants. Nothing herein contained shall be construed as preventing defendant, American Society of Composers, Authors and Publishers, from regulating the activities of its members in the following respects: (a) By requiring all moneys derived from the issuance of licenses by the respective members of defendant to be paid by the licensee to defendant and distributed in the same manner as other revenues; (b) by requiring of its members that notice be given the defendant of their intent to issue licenses before the issuance of same; (c) by prohibiting the members from

issuing exclusive licenses to commercial users of music; (d) by requiring, as a condition precedent to the issuance of a license by an individual member of the Society, the approval and consent, to be obtained by the licensor, of the composer (s), author (s) and publisher subject to such reasonable regulations as may be adopted by the composer (s), author (s) and publisher for that purpose; (e) by prohibiting the members from granting or assigning to persons, firms, corporations or enterprises, including Broadcast Music, Inc., the right to license or assign to others the right to perform publicly for profit the respective copyrighted musical compositions of which performance rights are owned or controlled by the respective members of the defendant Society.

[fol. 42] (2) Defendant, American Society of Composers, Authors and Publishers, shall not enter into, recognize as valid or perform any performing license agreement which shall result in discriminating in price or terms between licensees similarly situated; provided, however, that differentials based upon applicable business factors which justify different prices or terms shall not be considered discriminations within the meaning of this sub-paragraph; and provided further that nothing contained in this sub-paragraph shall prevent price changes from time to time by reason of changing conditions affecting the market for or marketability of performing rights:

(3) Defendant, American Society of Composers, Authors and Publishers, shall not require, as a condition to any offer to license the public performance for profit of a musical composition or compositions for radio broadcasting, a license fee of which any part shall be (a) in respect of commercial programs, based upon a percentage of the income received by the broadcaster from programs in which no musical composition or compositions licensed by said defendant for performance shall be performed, or (b) in respect of sustaining programs, an amount which does not vary in proportion either to actual performances, during the term of the license, of the musical compositions licensed by said defendant for performance, or to the number of programs on which such compositions or any of them shall be

performed; provided, however, that nothing herein contained shall prevent said defendant from licensing a radio broadcaster, on either or both of the foregoing basis, if desired by such broadcaster, or upon any other basis desired by such broadcaster.

[fol. 43] With respect to any existing or future performing license agreement with a radio broadcaster, defendant, American Society of Composers, Authors and Publishers, shall not, if required by such broadcaster, refuse to offer a per program basis of compensation on either or both of the following basis which may be specified by the broadcaster:

- (i) in respect of sustaining programs a per program license fee, expressed in terms of dollars, requiring the payment of a stipulated amount for each program in which musical compositions licensed by said defendant shall be performed;
- (ii) in respect of commercial programs, a per program license fee, either expressed in terms of dollars, requiring the payment of a stipulated amount for each program in which the musical compositions licensed by said defendant for performance shall be performed, or, at the option of defendant, the payment of a percentage of the revenue derived by the licensee for the use of its broadcasting facilities in connection with such program.

In the event that defendant shall offer to license the public performance for profit of a musical composition or compositions for radio broadcasting upon either or both of the foregoing per program basis, and shall also offer to license such performance on a basis of compensation which shall not vary in direct proportion either to actual performances during the term of the licenses of the musical compositions licensed by said defendant for performance or to the number of programs on which musical compositions licensed by defendant shall be performed, defendant shall act in good faith so that there shall be a relationship between such per program basis and such other basis, justifiable by applicable business factors, including availability, so that there will be no frustration of the purpose of this sub-



paragraph to afford radio broadcasters alternative basis of license compensation.

(4) Defendant, American Society of Composers, Authors and Publishers, shall not license the public performance for profit of any musical composition or compositions except on a basis whereby, in so far as network radio broadcasting is concerned, the issuance of a single license, authorizing and fixing a single license fee for such performance by network radio broadcasting, shall permit the simultaneous broadcasting of such performance by all stations on the network which shall broadcast such performance, without requiring separate licenses for such several stations for such performance.

(5) With respect to any musical composition in defendant's catalogue of musical compositions licensed for radio broadcasting and which is or shall be lawfully recorded for performance on specified commercially sponsored programs on an electrical transcription or on other specially prepared recordation intended for broadcasting purposes, said defendant shall not refuse to offer to license the public performance for profit by designated radio broadcasting [fol. 45] stations of such compositions by a single license to any manufacturer, producer or distributor of such transcription or recordation or to any advertiser or advertising agency on whose behalf such transcription or recordation shall have been made who may request such license, which single license shall authorize the broadcasting of the recorded composition by means of such transcription or recordation by all radio stations enumerated by the licensee, on terms and conditions fixed by said defendant, without requiring separate licenses for such enumerated stations.

(6) Defendant, American Society of Composers, Authors and Publishers, shall not, in connection with any offer to license by it the public performance for profit of musical compositions by users other than broadcasters, refuse to offer a license at a price or prices to be fixed by said defendant for the performance of such specific (i.e., per piece) musical compositions, the use of which shall be requested by the prospective licensee.

(7) Defendant, American Society of Composers, Authors and Publishers, shall not, in connection with any offer to license by it the public performance for profit of musical compositions by radio broadcasters, refuse to offer a license on a per performance or per program basis as provided for in paragraph 11 (3) hereof at a price or prices to be fixed by said defendant for the performance of such programs, the use of which shall be requested by the prospective licensee.

(8) Defendant, American Society of Composers, Authors and Publishers, shall not assert or exercise any right or power nor shall any of its members exercise any right or power to restrict from public performance for profit by any licensee of said defendant any copyrighted musical composition in order to exact additional consideration for the performance thereof, or for the purpose of permitting the fixing or regulating of fees for the recording or transcribing of such composition; provided, however, that nothing in this sub-paragraph shall prevent said defendant or its members from restricting performances of a musical composition in order reasonably to protect the work against indiscriminate performances or the value of the public performance for profit rights therein or to protect the dramatic performing rights therein, or, as may be reasonably necessary in connection with any claim or litigation involving the performing rights in any such composition.

(9) The Society shall not elect the members of the Board of Directors in any manner other than by a membership vote in which all author, composer and publisher members shall have the right to vote for their respective representatives to serve on the Board of Directors. Due weight may be given to the classification of the member within the Society in determining the number of votes each member may cast for the election of directors. Upon the expiration of the terms of office of the present directors, the provisions of this section shall apply to the election of their successors. Thereafter, not less than one-twelfth of the total membership of the Board of Directors shall be elected annually.

(10) Defendant, American Society of Composers, Authors and Publishers, shall provide in its by-laws that the Society shall not distribute to its members the moneys received by granting the right to perform copyrighted musical compositions publicly for profit on any basis other than the number, nature, character and prestige of the copyrighted musical compositions composed, written or published by each member, the length of time in which the works of the member have been a part of the catalog of the Society, and [fol. 47] popularity and vogue of such works, all to be determined in a fair and nondiscriminatory manner.

(11) Defendant, American Society of Composers, Authors and Publishers, shall not require as a condition precedent to eligibility for author or composer membership in the Society the regular publication of more than one musical composition or writing by any person who regularly practices the profession of writing music and the text or lyrics of musical works.

III. The terms of this decree shall be binding upon, and shall extend to each and every one of the successors in interest of defendant, American Society of Composers, Authors and Publishers, and to any and all corporations, partnerships, associations and individuals who or which may acquire the ownership or control, directly or indirectly, of all or substantially all of the property, business and assets of defendant, American Society of Composers, Authors and Publishers, whether by purchase, merger, consolidation, reorganization or otherwise. None of the restraints or requirements herein imposed upon the defendant shall apply to the acquisition of or licensing of the right to perform musical compositions publicly for profit outside the United States of America, its territories and possessions.

IV. For the purpose of securing compliance with this decree, and for no other purpose, duly authorized representatives of the Department of Justice shall, on the written request of the Attorney General or an Assistant Attorney General and on reasonable notice to defendant, American Society of Composers, Authors and Publishers, made to the [fol. 48] principal office of said defendant, be permitted (a)

reasonable access, during the office hours of said defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of said defendant, relating to any of the matters contained in this decree; (b) subject to the reasonable convenience of said defendant and without restraint or interference from it, and subject to any legally recognized privilege, to interview officers or employees of said defendant, who may have counsel present, regarding any such matters; and said defendant, on such request, shall submit such reports in respect of any such matters as may from time to time be reasonably necessary for the proper enforcement of this decree; provided, however, that information obtained by the means permitted in this paragraph shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings in which the United States is a party or as otherwise required by law.

V. This decree shall become effective ninety (90) days after the entry hereof, except that the provisions of subparagraph (6) of paragraph II shall become effective nine (9) months after the effective date of the other provisions of this decree.

VI. Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this decree to make application to the Court any time after the effective date hereof for such further orders and directions as may be necessary or appropriate in relation to the construction of or carrying out of this decree, for the modification hereof [fol. 49] upon any ground for the enforcement of compliance herewith and the punishment of violations hereof. Jurisdiction of this cause is retained for the purpose of granting or denying such applications so made as justice may require and the right of the defendant to make such application and to obtain such relief is expressly granted.

—Approved—

Henry W. Goddard, United States District Judge.

W.D.

We hereby consent to the entry of the foregoing decree.

For the complainant:

Thurman Arnold, Assistant Attorney General; Victor O. Waters, Special Assistant to the Attorney General; Warren Cunningham, Jr., Special Attorney.

For the Defendants:

Charles Poletti, Milton Diamond; Schwartz & Frohlich, by Herman Finkelstein, Member of the Firm.

Judgment rendered March 4, 1941.

George J. H. Follmer, Clerk.

W.D.

[fol. 50]

---

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK  
Civil Action No. 13-95

---

UNITED STATES OF AMERICA, Plaintiff.

—v—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND  
PUBLISHERS, ET AL., Defendants.

---

AMENDED FINAL JUDGMENT—Entered March 14, 1950

Plaintiff having filed its complaint herein on February 26, 1941, the defendants having appeared and filed their answer to the complaint denying the substantive allegations thereof, all parties having consented, without trial or adjudication of any issue of fact or law therein, to the entry of a Civil Decree and Judgment, filed March 4, 1941, and jurisdiction having been retained in this Court pursuant to Section VI of said Civil Decree and Judgment for the purpose of granting such modifications of the Civil Decree and Judgment as may be necessary and appropriate; and

Plaintiff having moved the Court that said Civil Decree and Judgment should be modified in certain respects, and all parties hereto consenting to such modifications and the entry of this Amended Final Judgment,

Now, Therefore, no testimony having been taken and without trial or adjudication of any issue of fact or law herein and without admission by any defendant in respect of any such issue and upon consent of all parties hereto, it is hereby

[fol. 51] Ordered, Adjudged and Decreed that the Civil Decree and Judgment of March 4, 1941 be amended to read as follows:

## I

This Court has jurisdiction of the subject matter hereof and of all parties hereto with full power to enter this Judgment. The complaint states a cause of action against the defendants under Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," commonly known as the Sherman Act, as amended.

## II

As used in this Judgment:

(A) "ASCAP" means the defendant American Society of Composers, Authors and Publishers;

(B) "Right of public performance" means the right to perform a copyrighted musical composition publicly for profit in a non-dramatic manner, sometimes referred to as "small performing right";

(C) "Motion picture performance right" means the right of public performance of music which is recorded in order to be performed in synchronism or timed relation to the exhibition of motion pictures;

(D) "ASCAP repertory" means those compositions the right of public performance of which ASCAP has or hereafter shall have the right to license or sublicense;



[fol. 52] (E) "User" means any person, firm or corporation who or which (1) owns or operates an establishment or enterprise where copyrighted musical compositions are performed publicly for profit, or (2) is otherwise directly engaged in giving public performance of copyrighted musical compositions for profit, or (3) is entitled to obtain a license from ASCAP under Section V of this Judgment.

### III

The provisions of this Judgment applicable to the defendant ASCAP shall apply to such defendant, its successors and assigns, and to each of their officers, directors, agents, employees, and to all other persons, including members, acting or claiming to act under, through or for such defendant. None of the injunctions or requirements herein imposed upon the defendants shall apply to the acquisition of or licensing of the right to perform musical compositions publicly for profit outside the United States of America, its territories or possessions, such acquisition or licensing being subject to the provisions of the Final Judgment entered this day in Civil Action No. 42-245.

### IV

Defendant ASCAP is hereby enjoined and restrained from:

(A) Holding, acquiring, licensing, enforcing, or negotiating [fol. 53] concerning any rights in copyrighted musical compositions other than rights of public performance on a non-exclusive basis;

(B) Limiting, restricting, or interfering with the right of any member to issue to a user non-exclusive licenses for rights of public performance;

(C) Entering into, recognizing, enforcing or claiming any rights under any license for rights of public performance which discriminates in license fees or other terms and conditions between licensees similarly situated;

(D) Hereafter granting any license for rights of public performance in excess of five years' duration, except for

motion picture performance rights which are licensed pursuant to Section V(C) of this Judgment;

(E) Granting to, enforcing against, collecting any monies from, or negotiating with any motion picture theatre exhibitor concerning any motion picture performance rights;

(F) Instituting or threatening to institute, or maintaining or continuing any suit or proceeding (1) against any motion picture theatre exhibitor for copyright infringement relating to motion picture performance rights or (2) against any user for copyright infringement of any musical composition not contained in the ASCAP repertory. After the preparation of the list required to be maintained by Section XIV herein, the repertory shall be deemed to consist of only those compositions appearing on such list;

(G) Restricting the right of any member to withdraw [fol. 54] from membership in ASCAP at the end of any fiscal year upon (1) giving three months' advance written notice to ASCAP, and (2) agreeing that his resignation shall be subject to any rights or obligations existing between ASCAP and its licensees under then existing licenses and to the rights of the withdrawing member accruing under such licenses;

(H) Asserting or exercising any right or power to restrict from public performance for profit by any licensee of ASCAP any composition in order to exact additional consideration for the performance thereof, or for the purpose of permitting the fixing or regulating of fees for the recording or transcribing of such composition. Nothing in this Subsection shall be construed to prevent ASCAP, when so directed by the member in interest in respect of a musical composition, from restricting performances of a composition in order reasonably to protect the composition against indiscriminate performances, or the value of the public performance for profit rights therein, or the dramatic performing rights therein, or to prevent ASCAP from restricting performances of a composition so far as may be reasonably necessary in connection with any claim or litigation involving the performing rights in any such composition.

## V

Defendant ASCAP is hereby ordered and directed to issue, upon request, licenses for rights of public performance of compositions in the ASCAP repertory as follows:

[fol. 55] (A) To a radio broadcasting network, telecasting network or wired music service (as illustrated by the organization known as "Muzak"), on terms which authorize the simultaneous and so-called "delayed" performance by broadcasting or telecasting, or simultaneous performance by wired music service, as the case may be, of the ASCAP repertory by any, some or all of the stations in the United States affiliated with such radio network or television network or by all subscriber outlets in the United States affiliated with any wired music service and do not require a separate license for each station or subscriber for such performances;

(B) To a manufacturer, producer or distributor of a transcription or recodation of a composition in ASCAP's repertory which is or shall be recorded for performance on specified commercially sponsored radio programs or television programs, as the case may be, on an electrical transcription or on other specially prepared recodation intended for radio broadcasting or for television broadcasting purposes (or to any advertiser or advertising agency on whose behalf such transcription or recodation shall have been made) of the right to authorize the broadcasting, by radio or by television, as the case may be, of the recorded composition by means of such transcription or recodation by all radio stations or television stations in the United States enumerated by the licensee, without requiring separate licenses for such enumerated stations for such performance;

[fol. 56] (C) To any person engaged in producing motion pictures (herein referred to as a "motion picture producer"), so long as ASCAP shall not have divested itself of such rights, a single license of motion picture performance rights covering the United States, its territories and possessions, without requiring further licenses. Such single license shall be issued in accordance with the following

requirements and in accordance with all other provisions of this Judgment not inconsistent therewith:

(1) Such license shall be limited to pictures produced or in production not later than one year after the effective date of the license, and shall not make any charge for any performance occurring prior to the date of this Judgment;

(2) Upon written request of any motion picture producer such licenses shall be issued on a "per film" basis for the compositions in such film which are in the ASCAP repertory;

(3) All licenses of motion picture performance rights under this Subsection (C) shall be negotiated with and issued to individual motion picture producers, and not on an "industry-wide" basis;

(4) Where within a period of nineteen (19) months prior to the entry of this Judgment a motion picture producer has obtained a license for motion picture performance rights directly from members of ASCAP and has paid a separately stated amount therefor, such licenses issued by ASCAP covering motion picture performance rights shall, at the request of such producer, include the rights conveyed by the previous license, in which event ASCAP shall allow the motion picture producer a credit against the amount otherwise payable, equal to the amount paid under the previous license;

(5) No writer or publisher member of the Board of Directors of ASCAP shall participate in or vote on any question relating to the negotiation, execution, performance or enforcement of any such license where such member at the time, directly or indirectly, has any pecuniary interest in any motion picture producer, in any subsidiary or affiliate of any motion picture producer, or in any contractual relationship with any such producer.

## VI

Defendant ASCAP is hereby ordered and directed to grant to any user making written application therefor a non-exclusive license to perform all of the compositions in the ASCAP repertory. Defendant ASCAP shall not grant to any user a license to perform one or more specified compositions in the ASCAP repertory, unless both the user and member or members in interest shall have requested ASCAP in writing so to do, or unless ASCAP, at the written request of the prospective user shall have sent a written notice of the prospective user's request for a license to each such member at his last known address, and such member shall have failed to reply within thirty (30) days thereafter.

[fol. 58]

## VII

Defendant ASCAP, in licensing rights for public performance for radio broadcasting and telecasting, is hereby:

(A) Enjoined and restrained from issuing any license, the fee for which

(1) in the case of commercial programs, is based upon a percentage of the income received by the licensee from programs which include no compositions in the ASCAP repertory, or

(2) in the case of sustaining programs, does not vary in proportion either (a) to the performance of compositions in the ASCAP repertory during the term of the license, or (b) to the number of programs on which such compositions or any of them are performed,

unless the radio broadcaster or telecaster to whom such license shall be issued shall desire a license on either or both of such bases:

(B) Ordered and directed to issue to any unlicensed radio or television broadcaster, upon written request, per program licenses, the fee for which

(1) in the case of commercial programs, is, at the option of ASCAP, either (a) expressed in terms of dollars, requiring the payment of a specified amount

for each program in which compositions in the ASCAP repertory shall be performed, or (b) based upon the payment of a percentage of the sum paid by the sponsor [fol. 59] of such program for the use of the broadcasting or telecasting facilities of such radio or television broadcaster,

(2) in the case of sustaining programs, is at the option of ASCAP, either (a) expressed in terms of dollars, requiring the payment of a specified amount for each program in which compositions in the ASCAP repertory shall be performed, or (b) based upon the payment of a percentage of the card rate which would have been applicable for the use of its broadcasting facilities in connection with such program if it had been commercial, and

(3) subject to the other provisions of Section VIII, takes into consideration the economic requirements and situation of those stations having relatively few commercial announcements and a relatively greater percentage of sustaining programs, with the objective that such stations shall have a genuine economic choice between per program and blanket licenses;

(C) Enjoined and restrained from requiring or influencing the prospective licensee to negotiate for a blanket license prior to negotiating for a per program license.

## VIII

Defendant ASCAP, in fixing its fees for the licensing of compositions in the ASCAP repertory, is hereby ordered and directed to use its best efforts to avoid any discrimination [fol. 60] among the respective fees fixed for the various types of licenses which would deprive the licensees or prospective licensees of a genuine choice from among such various types of licenses.

## IX.

(A) Defendant/ASCAP shall, upon receipt of a written application for a license for the right of public performance of any, some or all of the compositions in the ASCAP



repertory, advise the applicant in writing of the fee which it deems reasonable for the license requested. If the parties are unable to agree upon a reasonable fee within sixty (60) days from the date when such application is received by ASCAP, the applicant therefor may forthwith apply to this Court for the determination of a reasonable fee and ASCAP shall, upon receipt of notice of the filing of such application, promptly give notice thereof to the Attorney General. In any such proceeding the burden of proof shall be on ASCAP to establish the reasonableness of the fee requested by it. Pending the completion of any such negotiations or proceedings, the applicant shall have the right to use any, some or all of the compositions in the ASCAP repertory to which its application pertains, without payment of any fee or other compensation, but subject to the provisions of Subsection (B) hereof, and to the final order or judgment entered by this Court in such proceeding;

(B) When an applicant has the right to perform any [fol. 61] compositions in the ASCAP repertory pending the completion of any negotiations or proceedings provided for in Subsection (A) hereof, either the applicant or ASCAP may apply to this Court to fix an interim fee pending final determination of what constitutes a reasonable fee. If the Court fixes such interim fee, ASCAP shall then issue and the applicant shall accept a license providing for the payment of a fee at such interim rate from the date of the filing of such application for an interim fee. If the applicant fails to accept such license or fails to pay the interim fee in accordance therewith, such failure shall be ground for the dismissal of his application. Where an interim license has been issued pursuant to this Subsection (B), the reasonable fee finally determined by this Court shall be retroactive to the date the applicant acquired the right to use any, some or all of the compositions in the ASCAP repertory pursuant to the provisions of this Section IX;

(C) When a reasonable fee has been finally determined by this Court, defendant ASCAP shall be required to offer a license at a comparable fee to all other applicants similarly situated who shall thereafter request a license of

ASCAP, but any license agreement which has been executed without any Court intervention between ASCAP and another user similarly situated prior to such determination by the Court shall not be deemed to be in any way affected or altered by such determination for the term of such license agreement;

(D) Nothing in this Section IX shall prevent any applicant or licensee from attacking in the aforesaid proceedings or in any other controversy the validity of the copyright of any of the compositions in the ASCAP repertory nor shall this Judgment be construed as importing any validity or value to any of such copyrights.

## X

No officer or director of ASCAP, or any person acting on its behalf, shall participate in or vote on any question relating to any transaction or negotiation involving ASCAP and a licensee, or prospective licensee, where such officer, director, or other person has any pecuniary interest in such licensee or prospective licensee, or in any subsidiary or affiliate thereof, or in any contractual relationship with any such licensee or prospective licensee.

## XI

Defendant ASCAP is hereby ordered and directed to distribute to its members the monies received by licensing rights of public performance on a basis which gives primary consideration to the performance of the compositions of the members as indicated by objective surveys of performances (excluding those licensed by the member directly) periodically made by or for ASCAP.

[fol. 63]

## XII

Defendant ASCAP is hereby ordered and directed, within three months after the entry of this Judgment, to provide in its Articles of Association, effective as of the date of this Judgment, that ASCAP's members be prohibited from:

(A) At any time, while a member of ASCAP or thereafter, instituting, or threatening to institute, or maintain-

ing or continuing any suit or proceeding for acts of copy-right infringement relating to motion picture performance rights (1) alleged to have occurred prior to the date of this Judgment, or (2) where corresponding synchronization rights have been granted prior to the date of this Judgment;

(B) While a member of ASCAP, granting a synchronization or recording right for any musical composition to any motion picture producer unless the member or members in interest or ASCAP grants corresponding motion picture performance rights in conformity with the provisions of this Judgment.

### XIII

In order to insure a democratic administration of the affairs of defendant ASCAP, and to assure its members an opportunity to protect their rights through fair and impartial hearings based on adequate information, defendant [vol. 64] ASCAP is hereby ordered and directed to provide in its Articles of Association:

(A) That the members of the Board of Directors shall be elected by a membership vote in which all author, composer and publisher members shall have the right to vote for their respective representatives to serve on the Board of Directors. Due weight may be given to the classification of the member within ASCAP in determining the number of votes each member may cast for the election of directors. Elections for the entire membership of the Board of Directors shall take place annually or every two years. The Board of Directors shall, as far as practicable, give representation to writer members and publisher members with different participations in ASCAP's revenue distributions;

(B) That the general basis of member classification for voting and revenue distribution purposes shall be set forth in writing and shall be made available to any member upon request;

(C) That any member may appeal from the final determination of his classification by any ASCAP committee or board to an impartial arbiter or panel;

(D) That records be maintained by the officers, committees, or boards of ASCAP, and the impartial arbiters or panels referred to in Subsection (C) of this Section dealing with the classification of members and distribution of revenues, which will adequately apprise the respective members of the determinations made and actions taken by such officers, committees and boards of ASCAP, and arbiters or panels as to such members and the basis therefor.

#### XIV

Immediately following entry of this Judgment, defendant ASCAP shall upon written request from any prospective user inform such user whether any compositions specified in such request are in the ASCAP repertory, and make available for public inspection such information as to the ASCAP repertory as it has. Defendant ASCAP is furthermore ordered and directed to prepare within two years, and to maintain and keep current and make available for inspection during regular office hours, a list of all musical compositions in the ASCAP repertory, which list will show the title, date of copyright and the author, composer and current publisher of each composition.

#### XV

Defendant ASCAP is hereby ordered and directed to admit to membership, non-participating or otherwise,

(A) Any composer or author of a copyrighted musical composition who shall have had at least one work of his composition or writing regularly published;

(B) Any person, firm, corporation or partnership actively engaged in the music publishing business, whose [fol. 66] musical publications have been used or distributed on a commercial scale for at least one year, and who assumes the financial risk involved in the normal publication of musical works.

#### XVI

For the purpose of securing compliance with this Amended Final Judgment, duly authorized representatives

of the Department of Justice shall upon the written request of the Attorney General or an Assistant Attorney General, and on reasonable notice to defendant, be permitted (a) reasonable access, during the office hours of said defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of said defendant, relating to any of the matters contained in this Amended Final Judgment; (b) subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview officers or employees of said defendant, who may have counsel present, regarding any such matters; and said defendant, on such request, shall submit such reports in respect of any such matters as may from time to time be reasonably necessary for the proper enforcement of this Judgment, provided, however, that information received by the means permitted in this Section XVI shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings in which the [fol. 67] United States is a party or as otherwise required by law.

## XVII

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this Amended Final Judgment to make application to the Court for such further orders and directions as may be necessary or appropriate in relation to the construction of or carrying out of this Judgment, for the modification thereof, for the enforcement of compliance therewith and for the punishment of violations thereof.

It is expressly understood, in addition to the foregoing, that the plaintiff may, upon reasonable notice, at any time after five (5) years from the date of entry of this Amended Final Judgment apply to this Court for the vacation of said Judgment, or its modification in any respect, including the dissolution of ASCAP (and any time within two (2) years from said date apply to this Court for the vacation or modification of Section V(C) hereof). During the applicable periods specified above, defendant ASCAP is here-

by ordered and directed to conduct its affairs, including the making of agreements to acquire or license the rights of public performance, so as not unreasonably to complicate or delay the enforcement of any such further relief requested by plaintiff and granted by this Court pursuant to the terms of this Section.

[fol. 68]

### XVIII

This Amended Final Judgment shall become effective from the date of entry hereof, except that the provisions of Sections IV (G), XIII and XV shall become effective three months after the date of entry hereof, and the provisions of Section XI shall become effective eight months after the date of entry hereof. This Amended Final Judgment supersedes the Civil Decree and Judgment entered herein on March 4, 1941, but shall not be construed to make proper or lawful or sanction any acts which occurred prior to the date hereof which were enjoined, restrained or prohibited by said Civil Decree and Judgment of March 4, 1941.

Approved: March 14, 1950.

Henry W. Goddard, United States District Judge.

We hereby consent to the entry of the foregoing Judgment.

#### For the plaintiff

Sigmund Timberg, Special Assistant to the Attorney General; William D. Kilgore, Jr., Harry Lasser, Special Attorneys; Herbert A. Bergson, Assistant Attorney General; Melville C. Williams, Special Assistant to the Attorney General; Irving H. Saypol, United States Attorney.

#### For the defendants

Robert P. Patterson, Herman Finkelstein, Oscar Cox, Schwartz & Frohlich by Louis D. Frohlich.

Judgment entered: .

William V. Connell, Clerk.

O'G

March 14, 1950.



[fol. 69]

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

Civ. 13-95

UNITED STATES OF AMERICA, Plaintiff,

vs.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND  
PUBLISHERS, et al., Defendants.

Before: Hon. Sylvester J. Ryan, District Judge.

**Transcript of Proceedings of June 19, 1959**

New York, 3.15 o'clock p. m.

**APPEARANCES:**

William D. Kilgore, Jr., Esq., and Alfred Karsted, Esq.,  
Attorneys, Department of Justice, for the Plaintiff.

Arthur H. Dean, Esq., Howard T. Milman, Esq., Herman  
Finkelstein, Esq., and Ferdinand Pecora, Esq., Attorneys  
for Defendants.

[fol. 70]

**COLLOQUY BETWEEN COURT AND COUNSEL**

Mr. Kilgore: Well, your Honor, this involves a matter arising out of the amended final judgment entered in United States vs. American Society of Composers, Authors and Publishers. My name is William D. Kilgore, Jr., and I am accompanied by Mr. Alfred Karsted, representing the Anti-trust Division of the Department.

As part of our responsibilities under the amended judgment, in 1956 we started checking into compliance by ASCAP with the amended judgment. By 1958 we were prepared to file a motion requesting the Court to enter an order carrying out certain details of the amended judgment.

ASCAP requested and was given an opportunity to see if we couldn't negotiate the issues involved. The parties have now reached an agreement upon a proposed order which I submit to your Honor.

Well, first, I would like to give you a copy of the motion which the Department desires to file, the memorandum of the Department in support of that motion, and the order—

The Court: What is this, a motion made with the consent of the defendants?

Mr. Kilgore: No, sir. The motion is not made with the consent of the defendants. The terms of the order which [fol. 71] is proposed has been agreed to by the Government and ASCAP.

The Court: Will you date this notice of motion? Apparently it looks like a petition—

Mr. Kilgore: Yes, sir.

The Court: —rather than a notice of motion. It looks like a petition to me.

Am I correct in accepting this paper that you have now handed me as a petition filed on behalf of the Government?

Mr. Kilgore: Yes, sir, it is.

The Court: Rather than a notice of motion.

Mr. Kilgore: That's right, sir.

The Court: All right. And the petition prays for what relief?

Mr. Kilgore: The petition just has a general prayer, sir, and prays for entry of the order which is submitted at the same time.

The order is a printed document with two accompanying printed documents.

The Court: The accompanying printed documents are one entitled Writers Distribution Formula, and the other Weighting Formula.

Mr. Kilgore: Yes.

[fol. 72] The Court: Have you extra copies of these documents that you can leave with me?

Mr. Kilgore: Yes, sir.

The Court: All right. Are the defendants here represented?

Mr. Dean: Yes, your Honor. My name is Arthur Dean. I represent the American Society of Authors and Composers, and they are also represented by Judge Pecora, Mr. Finkelstein and Mr. Milman.

The Court: Are you appearing here by arrangement with the Government, without notice?

Mr. Dean: Yes, your Honor.

The Court: Have you extra copies of this order and of the paper that you want to submit to me?

Mr. Kilgore: Yes, sir.

The Court: Now, just what do you want the Court to do in connection with this proposed order, with the two schedules that you have just submitted?

Mr. Kilgore: I was looking for another copy of our memorandum, sir.

The Court: Well, you have given me one. Here, apparently, is the other one.

Mr. Kilgore: Right, sir. This will give you two complete sets, sir.

The Court: That is fine. Thank you.

[fol. 73] Mr. Kilgore: Your Honor, the proposed order relates to the activities of ASCAP which may be described generally as the internal operation of ASCAP. It relates to the method by which ASCAP determines what ASCAP music is played and what the names of the compositions are.

It deals also with the distribution system which makes up the rules under which the Society determines how much its publisher and writer members get for each of the performances that are logged in the survey.

It also deals with the voting rights of the members.

Presently there is no limit to the number of votes which a member has, but is determined by the revenues which the member earns from ASCAP.

The proposed order also deals with some other facets of ASCAP's operation, but because there are 1200, approximately 1200 publisher members of ASCAP and some 4000 writer and composer members of ASCAP, we are requesting the Court, because they are so vitally affected in this, if the Court will permit us to have the motion and the proposed order spread on the record for a period of time, [fol. 74] approximately 30 days, and thereafter if any of

the members of ASCAP, who feel that they are adversely affected by the proposed order, would give their comments to the Court and to the parties in order that we may best determine the appropriateness of the proposed order, to that end we desire to submit to you today a proposed order which is procedural in nature, but which would require that ASCAP mail a copy of the proposed consent order to each of its members, together with a notice that the matter will come on for hearing before your Honor on a date certain.

The order would also require that ASCAP notify its members that they should submit their comments to the Court in writing and any member desiring to be heard orally regarding his comments shall submit his request to the Court by date certain.

I submit to the Court the proposed procedural order which has been consented to by ASCAP and the Government.

The Court: Well, very frankly, I am not going to mince words about this. I don't like the procedure that is being followed here, and I think it is presumptuous to submit this matter to me in this form.

[fol. 75] I think had this step been contemplated I should have been consulted about it. I do not think it is a proper way to proceed in this matter, and I do not think the burden should be placed upon the Court of sifting through these objections which may be filed, if any.

I think that if the Government and the defendant Society have agreed that certain amendments and changes in the final decree are desirable and are agreeable to both parties, that it should be brought on by a formal application and an order to show cause which would provide for due and sufficient publication, which would set a return date at which time anybody might be heard in open court.

I think that is the procedure that should be followed. I don't think that I should operate as a clearing house for objections to be filed with me other than on a return date.

Mr. Kilgore: Well, your Honor, we are following here, to some extent, the precedent that was followed—that I am familiar with—in the Paramount case and which—

The Court: I know. I am following my own precedent.

[fol. 76] Mr. Kilgore: Right, sir.

The Court: And a precedent that I think is founded upon my own experience, limited though it may be.

Mr. Kilgore: Right. We will handle it as your Honor desires.

The Court: I think that is the way it should be handled, and I don't think the Court should operate as a clearing house for the filing of objections other than those that are filed on a given return date after due and appropriate notice.

Mr. Kilgore: Yes, sir.

The Court: I don't mean that by way of any personal criticism of counsel, but I do not propose in these antitrust suits, or in any other suit, to be used as a rubber stamp approval, and I think I have made my position quite plain before, not in this case, but in other litigation.

Now I have this further observation to make. I think that in a matter of this type, involving, as it does, perhaps the rights and substantial rights of a large number of members, that there should be ample opportunity to advise them and to give them due notice; that we have no right [fol. 77] to proceed in any hurried fashion with any procedure which might operate to dilute their rights as they now exist or to foreclose them from subsequently asserting any claims or objections.

I think the procedure that you outlined might well be a denial of due process, and I think that if this is to be handled it should be handled on a formal order to show cause which will provide for a method of notification which will give these people ample time to come in and make a formal protest if they desire to make it.

I don't see that you should hurry it in any period of 30 days.

Mr. Dean: Your Honor, we will, naturally, follow whatever procedure you recominend. What we had planned to do was to mail copies of the original decree, and this proposed amendment to it, and all of their rights—

The Court: Mr. Dean, here is my position in a nutshell, and I think you will appreciate it.

Mr. Dean: I understand, surely.

The Court: I think it would have been better if we had

sat down and discussed this matter in an informal fashion rather than come in and submit to me formal papers, expecting that I am going to approve them as a matter of form.

[fol. 78] Irrespective of my personal opinion as to the efficacy of the enforcement and carrying on of these continuing forms of injunctive relief which are granted in antitrust suits, and of the intolerable burden it places upon a busy court, it is the duty of this Court to carry it out, and I propose to do so.

However, I feel that there is a definite obligation placed upon the Court to act as an independent judicial body and not to function as an accessory to the Department of Justice or to any other subdivision of it.

Mr. Dean: I appreciate that. What we planned to do—

The Court: I don't say that by way of criticism—I again repeat—of anybody. This is not the way I am accustomed to act and to exercise my judicial functions.

Mr. Dean: Yes, sir. I might show you that what we planned to do was to mail this (indicating) some 30 days before whatever date you could hear us on it, and then we planned to have meetings, regional meetings in Los Angeles to explain it, and then a regional meeting in New York.

The Court: I am not going to be party to any propaganda [fol. 79] or any means of solicitation or urging.

Mr. Dean: No, sir.

The Court: I am not going to be used as an instrument of persuasion, and I think you can do what you desire with reference to meetings throughout the country; that is a matter for you and for the Department of Justice to determine. All that I will do will be to act upon a formal petition when it is presented to me; sign and execute an order to show cause, inviting all those who have an interest in this proceeding to appear on a date certain in court and make any objection, if they desire then, in open court, to the proposed amendment.

I don't think that 30 days is ample notice in view of the widespread interests which are here involved.

Mr. Dean: Could I ask you a question?



The Court: You may ask. We are talking here now, perhaps, more as lawyers than as a judge to lawyers.

Mr. Dean: Yes, sir. Ordinarily, of course, you have your stock corporation and your board of directors. Here we have an association of some—how many members are there altogether?

Mr. Kilgore: 5000.

[fol. 80] Mr. Dean: About 5000 members. Would you think that—I was just inquiring, what do you think is the appropriate way to give them notice, publication in newspapers?

The Court: I think if you are definite and certain as to who has a right to participate in the dividends, or whatever you would call them of ASCAP, and they are definitely identified, we might well avoid printed publication. But I think the notice should be such as would constitute due notice and meet all the requirements of due process as to notice, because here you are affecting, apparently—although I haven't read the proposed decree, nor have I, in any way, been advised about it, and I know nothing of what it contains—but apparently what you are doing here is to affect substantially—and I guess you are conscious of it, too, otherwise you wouldn't feel that notice should be given—you are affecting substantially the property rights of a large number of people.

Mr. Dean: That is correct, your Honor.

The Court: And you are affecting them, most likely, adversely.

Mr. Dean: Not necessarily.

[fol. 81] Mr. Kilgore: No.

Mr. Dean: It might be, but not necessarily.

The Court: Well, if it wasn't adversely, there would really be no need to give them any notice.

Mr. Dean: Well, the Department of Justice feels we are helping some of the members and that we are trying to carry out—

The Court: Well, you know, sometimes, whether or not you really are helping a man depends upon your point of view.

Mr. Dean: That is right, your Honor.

The Court: And many times someone has told you that they are doing you a great favor and helping you, and

you have felt that a grave injustice is about to be perpetrated upon you and that you are about to be ravished.

Mr. Karsted: Your Honor, as a matter of procedure, would your Honor propose taking evidence on the return date?

The Court: I don't know. I don't know what this proceeding is. You gentlemen came in—I received a telephone call, somebody wanted to come up to see me about some matter connected with ASCAP, somebody from the Antitrust Division in Washington. This is the first inkling [fol. 82] I have had of any proposed modification of this decree. I knew nothing of what this proposal contained.

I haven't in any way been advised of it, and I am in complete ignorance and darkness concerning its contents, its purpose or its effect. Whether or not on the return day there should be testimony taken to assure me, as the judge, that public interest is being amply protected, I don't know yet, and I won't know until first I have had an opportunity to digest whatever papers are submitted to me, to consider them and to consider them in the light of any objections which are filed.

Mr. Kilgore: Well, your Honor, we had planned just to file the petition or order, the proposed order, and make sure that the membership of ASCAP knew what was going on, because we are concerned about it. But I can appreciate your viewpoint.

The Court: So that you get my position—I don't mean to be too pointed about it; I don't think you intended to be presumptuous.

Mr. Kilgore: I did not, your Honor.

The Court: I don't think you intended to treat the Court as being simply an instrument that could be wielded and [fol. 83] directed in compliance to what you felt should be the course taken by the Court. But that is the net result of what you have done.

Mr. Kilgore: Well, we had requested, sir, an informal discussion with you, to put this proposed procedure before you.

The Court: I think you had progressed beyond that stage. I think you came to me with a well formulated plan that you both had in mind, and that you felt, here, now, the Judge will sign this and away it will go.

I don't like to approach judicial matters from that point of view and with that method of procedure.

Mr. Dean: How long a time do you think we ought to give notice, your Honor?

The Court: Well, I don't know how wide-scattered your so-called members are. By "your members" I take it you refer to those that have copyrights or who have an interest in copyrights, who are entitled to share in the collections of royalties which are made by the Society.

Mr. Dean: Yes, sir. They are both writers and publishers. They are widely scattered all over the United States.

The Court: Then I suppose some might even be residents [fol. 84] abroad. I don't know, I don't know. Some might live in Canada. I would say that there should be a minimum of 90 days, maybe 120 days notice.

Mr. Dean: We wanted to give the widest possible notice, the widest possible circulation of it.

The Court: I think there should be. You see, I know nothing of what this proposal is. I know nothing of its purpose, and I know still less about what its effect will be.

Mr. Kilgore: Well, it is because we were concerned with the possible effect of it, and not being able to talk to the membership of ASCAP—and they are widespread; we have heard views of a number of the members of ASCAP, and we were trying to come up with just some way so that we could get this before them.

The Court: I don't know what their views are. I don't know the medium by which they have been expressed or conveyed to the Department of Justice or to ASCAP itself. If you have had hearings on this matter I should have a transcript of them. If you have had communications on this matter from various members I should have them. I should have all expressions of opinion that you have already had.

You are asking me to take judicial action with reference [fol. 85] to a consent decree which was entered, my recollection is, in the time of Judge Goddard, and a modified decree was entered, and the original decree was—

Mr. Pecora: 1941, and then modified 1950.

The Court: Almost 17, 18 years ago. Now I may have to take testimony in order to satisfy myself that this

modification is of public interest. I may have to take testimony concerning the present condition of the industry and of the market.

Mr. Kilgore: Well, we had misjudged the Court's desires on it. We have been working on it for a little over a year and I guess maybe we are living a little bit too close to it, your Honor.

The Court: I think that may be the answer. Sometimes you get too close to a problem, you don't appreciate just what is involved. I don't know what is involved myself.

Mr. Kilgore: Because we had not any desire that the Court would just sign the order—

The Court: I don't question your sincerity of purpose or the sincerity of purpose of the defendants in any way, nor do I question your motives. I have to say that I am somewhat irritated by the procedure that you followed, [fol. 86] but I will try to remove that irritation, and I do so now.

Mr. Dean: If I might inquire, what are your plans, personal plans, Judge Ryan? Are you going to be here? I understand you are going to be away for several weeks.

The Court: My personal plans are that I will be here until around the 10th of July, and I will be able to be contacted thereafter, with the help of the Lord, while I remain on this earth. I have no intention of leaving the country, and I will at all times be in communication with the court here, and they will be with me. My plans are presently now—there is no secret about it—I intend to go to Boulder, Colorado, to the Conference at the University for about five days around the middle of July, then go up for two weeks to help out in Spokane where Judge Driver died about a year ago—was killed—and then come down to Denver for four weeks.

But there is no need that this should be delayed until my return or be delayed by my absence out of the District. It seems to me that there is ample time to prepare an order to show cause in the next two weeks or so, three [fol. 87] weeks, a simple order to show cause which will provide a method of publication such as I have indicated, as I think may be desirable, and a procedure whereby on a given return day objections may be filed in open court.

I don't want to be the clearing house for them prior to that date. I haven't the facilities for doing it.

If you want to provide that objections can be forwarded to the Attorney General, Antitrust Division, I have no objection to that, not precluding anybody from objecting on the return date.

Mr. Dean: We would like to mail copies of all these, all this material to each member, too.

The Court: I think you should follow the procedure which I know you are familiar with—I know Judge Pecora is familiar with—such as you might mail out in connection with an SEC compromise of a derivative stockholders suit or a prospectus, selling a new issue. It should be a full disclosure of what you plan, and perhaps you might include a statement by ASCAP, if you desire, in the form of a petition, in which ASCAP joins the position of the Government, and a petition of the Government.

But I don't know what you have in these papers. And [fol. 88] really, when I am outlining what I think is the desirable procedure, I am really outlining something concerning which I am entirely uninformed as to its substance and nature.

Mr. Kilgore: I hate to bother the Court with this—

The Court: Don't hesitate. You are not bothering me at all. I think if we had had a discussion like this a couple of weeks ago we might have approached this, not from a different point of view, but perhaps with a greater degree of understanding and we might have had now the result that is reached.

The only thing I don't like is, I don't like to have a mass of papers like this suddenly put before me, expecting forthwith, as a matter of fact, I will sign my name. I won't do it.

Mr. Kilgore: Well, your Honor, I think we were close to the end result that you have outlined. We had planned to do it merely through the use of using ASCAP as a means of getting notice to the people. We can modify the proposed order that—

The Court: But there is something basically different between us, and that is our philosophical approach to the



responsibilities and obligations of the Court with reference [fol. 89] to these final consent decrees in antitrust litigation.

I feel that the Court has a duty, independent of that of the Antitrust Division, a duty to see that the purpose of the statute is carried out in the proposed decree.

Mr. Karsted: I think, just to clear it up, we weren't asking for the Court to sign anything forthwith. We didn't want the Court to sign anything until after objections had come in.

The Court: You wanted an order to show cause, in effect, an order authorizing circulation of this and foreclosing all those interested from filing objections after 30 days, didn't you?

Mr. Kilgore: No.

Mr. Karsted: No.

Mr. Dean: No.

The Court: I haven't looked at your papers, but that is what I took it to be.

Mr. Dean: No, sir.

Mr. Karsted: But before your Honor signed it, to give due notice to everybody and to give them a chance to come in. We weren't really far apart from what your Honor wanted.

[fol. 90] Mr. Finkelstein: We had in mind 30 days, but that wasn't intended to bind the Court.

The Court: I don't like the procedure, very frankly.

Mr. Kilgore: We had not expected you—

The Court: If you want to do this, in the interest of saving the time of everybody, if you will leave these papers with me, I will go over them.

Mr. Dean: I think that would be fine.

Mr. Kilgore: It would be wonderful, sir.

The Court: And then I would be willing to meet with you gentlemen at a time when you won't feel under pressure and I won't have delayed you, and I will give you definitely just what my ideas and notions are with reference to the procedure to be followed.

I doubt whether it is going to differ essentially from what I have outlined to you today.

Mr. Kilgore: Right, sir. We certainly appreciate it.

Mr. Dean: Thank you very much.



The Court: When is it desirable? I don't believe in leaving matters hang in the air. When can you come back?

Mr. Kilgore: We will meet your convenience on it, sir.

[fol. 91] The Court: You can come back here at 8 o'clock tomorrow morning or 8 o'clock Monday morning. I generally get in here at ten after 8.

Mr. Dean: I can come back tomorrow morning. I have to be in San Francisco and Salt Lake City Monday.

The Court: Have a nice time. When will you be back from out there?

Mr. Dean: I will be back the following week, your Honor.

The Court: All right, I will give you a date, if it will be agreeable to you.

Mr. Dean: We can do it tomorrow morning or the following week.

The Court: I call the calendar here in the morning. You are going to be gone all of next week?

Mr. Dean: Yes, sir.

The Court: The 22nd to the 29th. I think we have a calendar for the 29th, in the afternoon. I can make it at half-past two on Monday, or I have an appointment here at 9.15 on Monday—I can make it early in the morning, if you want—but these men come from Washington. I will do whatever you want. I, as a rule, get in about a quarter after 8, ten after 8.

[fol. 92] Mr. Kilgore: The date is completely up to you all.

Mr. Dean: Do it any time you want to.

Mr. Kilgore: The afternoon is more convenient.

Mr. Dean: 2.30 on Monday.

Mr. Kilgore: This coming Monday?

Mr. Dean: A week from next Monday.

Mr. Kilgore: A week from next Monday?

The Court: The 29th.

Mr. Kilgore: We will be right here, sir.

The Court: All right.

Mr. Dean: Thank you very much.

Mr. Kilgore: Thank you, sir.

The Court: I hope you understand what my position is.

Mr. Dean: I understand very well.

(Adjourned to Monday, June 29, 1959, at 2.30 p.m.)

[fol. 93]

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
Civ. 13-95

---

UNITED STATES OF AMERICA, Plaintiff,

VS

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND  
PUBLISHERS, et al., Defendants.

---

Before: Hon. Sylvester J. Ryan, District Judge.

Transcript of Proceedings of June 29, 1959

New York, 2.30 o'clock p.m.

APPEARANCES:

William D. Kilgore, Jr., Esq., Attorney, Department of Justice, for the Plaintiff.

Howard T. Milman, Esq., Herman Finkelstein, Esq., Ferdinand Pecora, Esq., and Frederick A. Terry, Jr., Esq., Attorneys for Defendants.

[fol. 94] Frank Weinstein, Esq., Attorney for Certain member publishers.

Arthur Fishbein, Esq., Attorney for Certain member publishers.

Bernard A. Grossman, Esq., Attorney for Music & Talent Organization, Inc.

[fol. 95]

COLLOQUY BETWEEN COURT AND COUNSEL ON  
ISSUANCE OF RULE TO SHOW CAUSE

The Court: Gentlemen, I asked you to appear here today so we might consider and discuss the procedure we ought to follow in connection with the proposed modification of the

final decree which was entered in this matter. It was submitted informally to me last week in two papers, and I had an opportunity to go over them and I have sent you a little private memorandum, which was private only in the sense that I felt it was not necessary to file it, it is more or less a procedural matter.

Mr. Weinstein, I note your appearance here. Why are you here?

Mr. Weinstein: I appear for certain music publisher members of ASCAP for a great number of years. I believe I was principally responsible, together with the clients whom I represent, in having a Congressional Committee organized, of which the Hon. James Roosevelt was chairman, to investigate the affairs of ASCAP.

I appeared in Washington at the hearings, submitted witnesses and affidavits in support of our contention that the consent decree should be modified. I believe your Honor has a copy, printed copy, of the hearings and the recommendations of the Committee which was widely distributed.

[fol. 96] The Court: I do not have a copy of it.

Mr. Weinstein: I will be glad to furnish your Honor with a copy.

The Court: I will be very happy to receive one from you as a friend of the court.

Mr. Weinstein: Thank you, your Honor.

I saw one of your secretaries here when I appeared here a few days ago and I thought I saw a copy on her desk.

The Court: You might have seen it, he or she might have seen it, but I haven't seen it.

Mr. Weinstein: If you haven't got it, I will provide you with a copy. I haven't received a copy of the proposed decree or the memorandum. I am here, after your Honor indicates the procedure that is to be followed, to make certain suggestions for consideration of the court.

The Court: At the present time you are a stranger to the suit. And while I am glad to have you here as a member of the bar and as a representative of parties that you say may possibly be affected by the action taken by the court, your appearance at the present time is only that of a friend of the court.

Mr. Weinstein: Then I am appearing as amicus curiae [fol. 97] for the time being.

The Court: I don't know whether I will permit you to participate even as amicus curiae. Suppose, then, without giving you a fancy title, I tell you that I will be very happy to have you sit here.

Mr. Weinstein: And I will reserve my rights and make a formal application.

The Court: You may reserve all or any rights you may have and I will be glad to have you here.

Mr. Weinstein: Thank you.

Mr. Fishbein: I am curious, that is why I am here today. I also appeared before the Roosevelt committee in Washington on behalf of one of the publisher members of ASCAP. I had read some trade paper accounts of this scheduled hearing in chambers today and as a result of curiosity I merely came down to see the proposed order. I talked to Mr. Kilgore before this hearing, and he explained the procedure, and I see no reason for me to participate, nor do I intend to participate.

The Court: The hearing is open to the public at such informal hearing as this might be.

Mr. Grossman: At the present time my interests are [fol. 98] being represented by ASCAP and I am a stranger to the suit.

The Court: What interests do you represent?

Mr. Grossman: A publisher company just admitted to ASCAP.

The Court: What is its name?

Mr. Grossman: Music & Talent Organization, Inc.

The Court: I hope your venture proves profitable.

Mr. Grossman: Thank you, your Honor.

The Court: You gentlemen submitted to me an order to show cause and a proposed ratification of the final decree, which apparently have been consented to, and other papers in connection with the motion. You both expressed a desire that the matter be brought on for hearing in court upon some form of notice to all you felt might be affected by the proposed modification, so an opportunity may be granted to them to be heard if the court desires to hear them.

I went through your papers and through the proposed

modification and I don't pass, as I indicated to you, upon the merits of what you agreed upon amongst yourselves—I mean the government and ASCAP. I am concerned only with the procedure that we should follow in order to enable [fol. 99] the court to take formal action upon what I take to be a submission of this proposed consent decree modification by the court.

You both have suggested that notice be given to all of the ASCAP members. I think that is a very fair step to take and perhaps on a return day the court may receive some benefit of any observations that members of ASCAP might have to make or other parties might have to make, whose interests might be affected by the proposed modification.

There is just one thing that I particularly want to point out, and that is that I do not want to be in a position, nor will I permit myself to be in a position, where I would pass upon the respective rights of ASCAP as an organization or corporation and on its prospective members or parties who have signed contracts with ASCAP. That is a matter for ASCAP to determine itself. Nor will I pass upon the wisdom of these matters with respect to the modification in so far as it is intended to influence an action of the Antitrust Division.

I will have a hearing on this matter. I think it is desirable that a hearing be held on this matter on appropriate notice, [fol. 100] but it will be for the sole purpose of determining that the public interest will be best served by the modifications proposed and that it will serve, the proposed modifications will also serve to accomplish the ends sought to be accomplished by the original suit as it was filed.

With that purpose in mind, perhaps I should make an additional observation. Though I may hear parties as friends of the court on the return of any notice that we provide for, I see at this time no need, necessity or occasion to permit any intervention. However, I am not now ruling that I might not change my mind in the future. However, at present I think the public interest is being amply served and protected by the Antitrust Division and presently I see no need to permit any intervention.

What suggestion has the government to make?

Mr. Kilgore: I would like to have the benefit of your thinking with respect to your reservation as to the adjudication of contractual rights of members.

The Court: I have a right to determine whether or not any existing contract between ASCAP and its members offends either the express wording or provisions of the decree or its general purpose, or frustrates the purpose of [fol. 101] the decree. If ASCAP has, by reason of any private undertaking with any of its members, entered into any contract, I am not here to adjudicate upon whether or not ASCAP has a right to modify any existing contract with the members or not. That is for them to determine.

Mr. Kilgore: I asked the question, your Honor, because clearly the proposed order affects the outstanding rules, many of the outstanding rules.

The Court: I have a right to direct ASCAP as an organization to modify its rules either with or without its consent. I have power under the reserve jurisdiction of a decree to direct that these modifications of the rules and regulations be made, when I feel they are necessary to accomplish the purposes of the suit. Whether or not ASCAP is complying with the decree, is violating its contract with its membership, I am not here to pass upon.

Mr. Kilgore: The proposed order requires the consent of its members to certain changes.

The Court: That is a matter of the internal affairs of ASCAP; it is not the concern of this court. The individual members are not parties to this suit, ASCAP is.

[fol. 102] Mr. Weinstein: There may be a difference of opinion on that, your Honor.

The Court: At this stage, counsel, I don't want to hear from you. I will hear from you when we are completed. I will hear any observation you wish to make.

At this stage, your best function as a friend of the court, is to wait until I ask to hear from you.

Mr. Kilgore: The two alternative suggestions as to procedure, your Honor, as to those, we prefer the second step.

The Court: The second step as I outlined it to you was that this court has jurisdiction to act upon the proposed amended final consent judgment if brought on before me



by an order to show cause. I suggested that it be returnable in 120 days from the signing. If 120 days is not sufficient time to give notice which would constitute due process, we can extend the time. However, I think it should be no less than 120 days. That notice should be due and appropriately given by mail—I don't see any necessity for publication, however, I will be glad to hear you on that—to all designated as members of ASCAP. On the return of this order to show cause, an opportunity will be given to the members of [fol. 103] ASCAP to appear in connection with the proposed consent judgment, upon application to be heard by the court, and make that application upon the ground that the proposed amendments will not accomplish the antitrust purposes of the suit.

However, I want it understood that I do not intend to pass upon or adjudicate in this hearing or in this suit any contractual rights presently existing between ASCAP and its members, nor do I intimate that any strangers to the suit will be permitted to intervene.

As I recall it, I had occasion to so comment in a ruling I made under date of October 23, 1956. I see no reason to permit an intervention, because at present I find that the Antitrust Division of the Attorney General's Office has performed its function in carrying out the order.

Mr. Kilgore: We have drafted a proposed order which I believe embodies the substance of your suggestion, to wit, an order that the parties to the cause, the government and ASCAP, are to appear on a day certain—120 days we believe will be ample—at which time the court would hear the parties as to why the order should be approved.

[fol. 104] The Court: By the order you mean the amended consent to the final judgment?

Mr. Kilgore: Yes.

Mr. Milman: If your Honor pleases, I should—

The Court: Suppose we let counsel finish first. Make a note of what you have in mind.

Mr. Kilgore: What I have here may be inartistically worded, but in effect the court would direct the Society to give a copy by mail to each of its members, a copy of the consent order and of this order also, and the plaintiff should send to any member who writes to us and requests a copy

of it, a copy of our motion and a copy of our memorandum in support. Then this order which we send out to the membership recites that the members may at such hearing make application to the court to be heard on the ground that the proposed consent order will not accomplish the antitrust purposes of this suit.

This does not embody the consent that you have mentioned again here today with respect to the contractual rights. Whether your Honor believes that that should be in there—

The Court: It does not have to be in here because I don't [fol. 105] believe I have the jurisdiction to do so.

We interrupted the defendants' attorney before; you wanted to say something and I asked you to remain silent. You may now proceed.

Mr. Milman: What I wanted to say—

The Court: Give the friend of the court a copy of it.

Mr. Milman: What I wanted to say was that the document which was submitted to your Honor has been entitled a proposed consent order and not an amended final judgment. I think it is the view of the government and the view of our side that it is an order pursuant to the judgment rather than an amendment of the judgment itself, and that is why we have referred to it in the papers submitted as—

The Court: I think we are quibbling over terms, but it seems to me it is an addition to and a supplementary to a final judgment, and therefore it is an addition to the final judgment. Whether or not it is a modification is a matter of opinion. We will make it "amended final consent judgment".

Have you any other comment that you desire to make? [fol. 106] Mr. Milman: No.

The Court: Now we will hear you, Mr. Weinstein, as a friend of the court.

Mr. Weinstein: I would suggest that 120 days is not sufficient, your Honor.

The Court: What is your idea?

Mr. Weinstein: Well, 150 days, for this reason. The summer months are coming on. Most members will be away on vacation in July and August. Personally, I am going abroad Saturday, and I will be gone until September 2nd.

I suggest 150 days from the date the order to show cause is signed.

The Court: Well, 120 days makes four months.

Mr. Weinstein: Yes, and 150 days would make it five months. I eliminate the months of July and August entirely because I don't think we can count on those months.

The Court: Except if modification should be made it is desirable that it should be put into effect as soon as possible.

Mr. Weinstein: But the members should have a complete opportunity, your Honor.

The Court: That would make it sometime in October rather than September?

[fol. 107] Mr. Weinstein: The middle of October, your Honor.

Mr. Kilgore: We have a problem with respect to the mechanics. I personally have no objection as such to five months, except we must take into consideration the fact that if these rules go into effect, ASCAP had hoped to be able to get their distributions under the new rules started in October.

The Court: I think four months is enough; that will give everybody time. It will be generally known in the trade. Four months is time enough. That will be July, August, September and October.

Mr. Weinstein: Yes. I miscalculated by a month.

The Court: Well, 120 days, about that, would be enough. We might even cut it down a few days. It would be desirable if we could, if these rules are approved, to put them into effect the first of the year.

Mr. Finkelstein: The fiscal year begins October 1st.

Mr. Weinstein: You can make them retroactive.

The Court: Except that makes it more complicated from the accounting and bookkeeping point of view.

[fol. 108] Mr. Fishbein: They are six months behind in their logging anyway.

The Court: I don't think it should be under 120 days.

Mr. Finkelstein: We may want to discuss the problem of putting things into effect; a lot of these things we wanted to change anyway.

The Court: There is nothing to stop you from making

any changes prior to the return date, so long as you don't violate the terms of the decree.

Mr. Kilgore: Your Honor, that is a little bone of contention between counsel of ASCAP and the government, because we started a little over a year ago, and they made a change which we were afraid would make our case moot, so we asked them please not to make any substantial changes.

The Court: Your contention was they were violating the law. It is never wrong for someone to stop violating the law.

Mr. Fishbein: I didn't mean to raise something controversial.

The Court: It is never wrong or objectionable for somebody to stop doing something that is wrong, in fact, it is desirable. If ASCAP wanted to put any changes into effect prior to the return date that did not violate the terms [fol. 109] of the decree, there is no reason why they couldn't do it.

Mr. Kilgore: The government would have no objection to it.

The Court: That is up to ASCAP. I am not directing them to do it.

Does anybody else want to be heard?

Mr. Milman: I would like to advert to something, that is, that the plaintiff will mail upon any member's written request, a copy of its motion and memorandum in support thereof. We have agreed to send to each member a copy of the proposed consent order or modification.

The Court: I won't direct that the plaintiff mail at all. If the plaintiff wants to mail to anybody, it may do so. If you want to mail to ASCAP members copies of your memorandum, you may do so, but I don't want you to promote propaganda in the trade.

Mr. Kilgore: We had hoped whatever order your Honor enters would be sent to the members.

The Court: What I want mailed to the members is a copy of this order, a copy of the proposed amended consent decree with the two appendixes and a copy of those two forms of agreement that I saw.

[fol. 110] Mr. Milman: The new formulas.

The Court: They seemed to be a little different from the appendices, the writer's distribution formula and the weighing formula, a copy of these documents and a copy of this order.

Mr. Milman: And the amended final judgment of 1950.

The Court: You may send them anything else you want to as long as it is not propaganda. I don't want anything put in your letter or in your inclosure sending these documents. You can send it under separate cover if you want, but I don't want anything put in the letter other than what I have specified. If you want in addition to send them other material; argumentative in form, you may do so under a separate cover. If the government wants to send any memorandum to any of the members, they may do so under separate cover. I don't want anything in the nature of a solicitation. Judge Pecora is familiar with that, solicitation accompanying judicial notice.

Mr. Finkelstein: Anything that is explanatory, because that may be argumentative, you don't want us to send.

The Court: You may put that in under separate cover.

[fol. 111]\* Mr. Weinstein: May I have a copy of these papers?

The Court: I am sure counsel will be very happy to accommodate you.

Mr. Fishbein: May I also have a copy?

The Court: I am sure counsel will be happy to accommodate you as well.

Mr. Kilgore: I don't have extra copies here.

The Court: You can mail copies to these gentlemen.

I will read to you what I have done here, gentlemen.

Upon the motion of the plaintiff for an order to further amend the amended final judgment entered herein on March 14, 1950, for the purpose of carrying out said judgment by the proposed consent further amended final judgment attached hereto upon motion of the attorneys for the plaintiff herein, it is hereby ordered that the parties to this action should cause before this court at a hearing to be held on the 19th of October 1959, at the United States District Courthouse, Foley Square, New York, N. Y., Room



[fol. 112] 129, at 10:00 a.m., or as soon thereafter as counsel can be heard, why the proposed further amended final judgment should be approved and entered by this court.

"And it is further ordered that the defendant ASCAP will mail a copy of this order, of the amended final judgment entered on March 14, 1950, and of the proposed consent further amended final judgment to each of its members on or before July 17, 1959; and it is further ordered that any party or individual who has an interest affected by these proceedings may appear at such hearing and make application to be heard upon the ground that the proposed consent further amended final judgment will not accomplish the antitrust purpose of this suit."

Any objection to that?

Mr. Kilgore: There would be one question: whether you wanted at this time to specify that no evidence would be taken at the hearing.

The Court: I do not want to make any reference to it at all. I may decide to take testimony. I don't know. I am not saying one way or another. I don't anticipate there will be need for it. However, I don't want to preclude myself.

[fol. 113] Mr. Milman: The consent of ASCAP has been based here, as have other consent decree negotiations and other matters, on the fact that Section V of the Clayton Act would be applicable where a consent order without the taking of testimony would not operate as prima facie evidence in any other case.

The Court: At this time I am not going to say whether testimony is necessary or not. However, it seems to me that since this is an amended to a final consent decree, it would still be a consent decree. I do not think it will be evidence of a wrong in another suit.

Mr. Finkelstein: That is what we are worried about.

The Court: If I decide to take testimony, you may withdraw your consent at any time before it is acted upon. I do not want to preclude myself from taking testimony.

Mr. Milman: I think that is very fair.

Mr. Weinstein: I respectfully submit that at the very end of the last paragraph the following words be inserted "or make such further applications as they may be advised."



I am familiar with your Honor's decision in 1956 that [fol. 114] you previously referred to, where you refused to permit a member to become a party. However, I desire to call your Honor's attention to some statutory law which was not called to your Honor's attention. I would like on the return day to make an application to either become a party or appear as *amicus curiae*. We are entitled to become a party to the suit if it is an unincorporated association.

The Court: It is a membership corporation.

Mr. Weinstein: It is a non-incorporated association.

The Court: It exists under the membership corporation law of the State of New York.

Mr. Finkelstein: It is a common law association. It may be sued as an unincorporated association.

Mr. Weinstein: There is a special statute which provides that the president or treasurer can be sued, representing all the members. As I represent a member, I am a party to the suit.

The Court: I am not going to pass upon it now, and I am not going to change this at this time. You may make any application on formal papers that you desire to. I am not going to entertain sort of an *ex parte* informal application of such importance now. If you want to make an application, do it on papers and on notice, and I will listen to you and I will give you my decision as a matter of record.

Mr. Weinstein: I will do so, and make it returnable the same date.

The Court: Make it returnable at any time you want.

If this is satisfactory, I will sign it.

Mr. Kilgore: Shall we have it typed up anew?

The Court: Yes, you can have it done; it will only take a few minutes. The proposed amended consent decree, the writer's distribution formula and the weighing formula will all be annexed to this order to show cause, so we will have a batch consisting of the order, and the three documents annexed to it. All these other papers that were not acted upon by me you can have back. I am not even considering them in this application.

Mr. Kilgore: You do not desire us to file the motion?

The Court: If you want to file a formal notice of motion you may do so, but then if you do so, you must afford them an opportunity to submit an answering affidavit, be- [fol. 116] cause your notice of motion, what you described as a motion, is a combination, as I pointed out to you, of a notice of motion, a memorandum and a couple of other things. If I permit this, then I must afford the defendant an opportunity to file another similar paper.

Mr. Kilgore: We had thought if we filed a motion, which you correctly described last week as a dual-purpose motion, ASCAP could come in and make a formal answer to that.

The Court: If you want that done, then give me back that order and I will make an order when I get everything before me. I am not going to issue an order to show cause now and subsequently receive other papers from ASCAP. I have no objection to you pressing this motion, and I will give ASCAP time to submit in opposition. Then I will make my own ruling.

Mr. Kilgore: We will have this order retyped, your Honor.

The Court: Have those three documents affixed to it, and I will sign it.

Do you desire to say anything else, Mr. Weinstein?  
[fol. 117] Mr. Weinstein: No, sir.

The Court: Does anybody else want to be heard?

Nobody. Very well.

(Hearing concluded.)

[fol. 118]

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
Civil Action No. 13-95

---

UNITED STATES OF AMERICA, Plaintiff,

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND  
PUBLISHERS, et al., Defendants.

---

ORDER TO SHOW CAUSE, ETC.—June 29, 1959

Upon the motion of the plaintiff for an order to further amend the Amended Final Judgment entered herein on March 14, 1950, for the purpose of carrying out said Judgment, by the proposed consent further amended Final Judgment attached thereto, and upon motion of the attorneys for the plaintiff herein, it is hereby

Ordered that the parties to this action show cause before this Court at a hearing to be held on the 19th day of October, 1959, at the United States Court House, Foley Square, New York, New York, Room 129, at 10 A.M., or as soon thereafter as counsel can be heard, why the proposed consent further amended Final Judgment should be approved and entered by this Court; and it is further

Ordered that the defendant, American Society of Composers, Authors and Publishers, mail a copy of this order, of the Amended Final Judgment entered on March 14, 1950, and of the proposed consent further amended Final Judgment to each of its members on or before July 17th, 1959; and it is further

Ordered that any party or individual who has an interest affected by these proceedings may appear at such hearing and make application to be heard upon the ground that the

proposed consent further amended Final Judgment will not accomplish the antitrust purpose of this suit.

Sylvester J. Ryan, Chief Judge.

June 29th, 1959

[fol. 118a]

NOTE RE ATTACHMENTS PURSUANT TO  
STIPULATION OF COUNSEL AS TO PRINTING RECORD

Clerk's Note: Please print the following notation in lieu of printing pages 49-105:

"Attached to the Order of June 29, 1959 were the proposed consent further amended Final Judgment, together with Attachments A, B and C and the Writers' Distribution Formula and Weighting Formula referred to therein. These documents, as amended by the Order entered October 8, 1959 amending said 'Weighting Formula' and by the Consent and Order entered January 7, 1960 (both of which Orders are printed elsewhere in this Record), are substantially identical to the Consent Further Amended Final Judgment entered January 7, 1960 and the documents attached thereto, which are printed elsewhere in this Record."

[fol. 176]

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF ARNOLD SAEMANN AS TO MAILING DOCUMENTS—  
Filed July 17, 1959

State of New York,  
County of New York, ss.:

ARNOLD SAEMANN, being duly sworn, deposes and says:  
I am over twenty-one years of age and am employed by the  
American Society of Composers, Authors, and Publishers

(hereinafter "ASCAP"). My duties include the supervision of mailing documents to the members of ASCAP.

Exhibit "A" hereto attached is a copy of a booklet containing copies of (1) an Order signed by Chief Judge Sylvester J. Ryan on June 29, 1959, (2) a proposed consent order further amending the Final Judgment in the above action, (3) a proposed Writers' Distribution Formula, (4) a proposed Weighting Formula, and (5) the Amended Final Judgment entered in the above action on March 14, 1950.

Exhibit "B" hereto attached is a copy of a letter, dated July 10, 1959, addressed to all members of ASCAP and signed by Stanley Adams, President of ASCAP.

On the 8th, 9th and 10th days of July, 1959, envelopes were addressed to all members of ASCAP by running [fol. 177] them through the ASCAP addressograph. Thereafter, one copy each of the documents attached hereto and marked Exhibit "A" and Exhibit "B", and no other documents or material, were inserted in each of such envelopes. On the 10th day of July, 1959, at approximately 11:00 A.M. and 5:00 P.M. Eastern Daylight Saving Time, all the aforesaid envelopes, securely sealed and postpaid, first-class, were mailed at the Grand Central Station branch of the New York Post Office.

Arnold Saemann

Sworn to before me this 14th day of July, 1959.

Henry Hofschuster, Notary Public, State of New York,  
No. 03-6934300, Qualified in Bronx County, Certificate filed  
in New York County, Commission Expires March 30, 1960.

**NOTE RE EXHIBIT "A" PURSUANT TO STIPULATION OF  
COUNSEL AS TO PRINTING RECORD**

"A booklet having the following cover page, and containing the papers indicated on said cover page, and the notice To All Members of the Society appearing below, were mailed by the Society to each and every member on July 10, 1959. The papers described on said cover page are printed elsewhere in this Record."

[fol. 178]

## EXHIBIT "A" TO AFFIDAVIT

AMERICAN SOCIETY OF COMPOSERS,  
AUTHORS AND PUBLISHERS  
.575 Madison Avenue  
New York 22, New York

---

This booklet contains the papers upon which a hearing will be held on a proposed Consent Order further amending the Society's existing Consent Decree (which was first amended in 1950). Specifically, the booklet contains:

- 1—Order signed by Chief Judge Sylvester J. Ryan of the United States District Court for the Southern District of New York, providing for a hearing on October 19, 1959 with respect to a proposed Order, consented to by the Government and by the Society, further amending the Amended Final Judgment of March 14, 1950.
- 2—The proposed Order, with Attachments A, B and C thereto.
- 3—The proposed Writers' Distribution Formula.
- 4—The proposed Weighting Formula.
- 5—The Amended Final Judgment entered on March 14, 1950 in *United States v. American Society of Composers, Authors and Publishers* (the existing Consent Decree).



[fol. 179]

## EXHIBIT "B" TO AFFIDAVIT

MURRAY HILL 8-8800 CABLE ADDRESS: ASCAP, NEW YORK

AMERICAN SOCIETY OF COMPOSERS, AUTHORS  
AND PUBLISHERS  
575 MADISON AVENUE  
NEW YORK 22, N. Y.

STANLEY ADAMS  
PRESIDENT

July 10, 1959

*To All Members of the Society:*

Pursuant to an Order signed by Judge Ryan, the Society is sending you the enclosed booklet, which contains: (1) the Order signed by Judge Ryan on June 29, 1959, (2) the proposed consent order, with three attachments thereto, (3) the proposed Writers' Distribution Formula, (4) the proposed Weighting Formula, and (5) the Amended Final Judgment entered on March 14, 1950 in *United States v. ASCAP* (the existing consent decree).

For some time the Society has had negotiations with the Department of Justice in respect to the Amended Final Judgment of 1950. As a result of those negotiations, the proposed consent order with attachments thereto (which would further amend the Amended Final Judgment), the proposed Writers' Distribution Formula and the proposed Weighting Formula have been submitted to Judge Ryan for approval and have been filed in the United States District Court for the Southern District of New York. A hearing thereon has been set for October 19, 1959.

Sincerely yours,

/s/ STANLEY ADAMS  
Stanley Adams  
President

[fol. 180]

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 13-95

[Title omitted]

AFFIDAVIT OF EDWARD ROSENBERG AS TO MAILING DOCUMENTS  
—Filed October 9, 1959State of New York,  
County of New York, ss.:

Edward Rosenberg, being duly sworn, deposes and says:

I am over twenty-one years of age and am employed by the American Society of Composers, Authors and Publishers (hereinafter "ASCAP"). My duties include the supervision of mailing documents to the members of ASCAP.

Exhibit A hereto attached is a copy of a booklet containing copies of (1) a letter dated July 21, 1959, addressed to all members of ASCAP and signed by Mr. Stanley Adams, President of ASCAP, (2) a letter dated July 21, 1959, addressed to Mr. Stanley Adams and signed by Arthur H. Dean, Esq., (3) a "Memorandum prepared for the information of the members of ASCAP, with respect to the proposed Consent Order to be submitted to Chief Judge Ryan on October 19, 1959," signed by Arthur H. Dean, Esq., and (4) a press release issued by the Department of Justice on June 29, 1959.

On or about July 20, 1959, envelopes were addressed to all members of ASCAP by running them through the [fol. 181] ASCAP addressograph. Thereafter one copy of Exhibit A, and no other documents or material, was inserted in each of such envelopes. On July 21, 1959, all the aforesaid envelopes, securely sealed and postpaid, first-class, were mailed at the Grand Central Branch of the New York Post Office.

Edward Rosenberg

Sworn to before me this 8th day of October, 1959.

Henry Hofschuster, Notary Public, State of New York,  
No. 03-6934300, Qualified in Bronx County, Certificate filed  
in New York County, Commission Expires March 30, 1960.

[fol. 182]

EXHIBIT "A" TO AFFIDAVIT

Murray Hill 8-8800 Cable Address: ASCAP, New York

AMERICAN SOCIETY OF COMPOSERS,  
AUTHORS AND PUBLISHERS

575 Madison Avenue  
New York 22, New York

STANLEY ADAMS  
President

July 21, 1959

*To All Members Of the Society:*

In connection with the proposed Consent Order which will be submitted to Chief Judge Ryan on October 19, 1959, the Society has already mailed to each of the members copies of the Notice of Hearing, the proposed Consent Order and three attachments thereto, the proposed Writers' Distribution Formula, the proposed Weighting Formula, and a copy of the Amended Consent Judgment of March 14, 1950.

When the Department of Justice raised the question whether the Society's practices were in compliance with the Amended Consent Judgment, the Society retained Mr. Arthur H. Dean of the law firm of Sullivan & Cromwell as special counsel.

Extended negotiations with the Department of Justice resulted in agreement by the Department and the Society on the terms of the proposed Consent Order, which has the unanimous endorsement of the Board of Directors of the Society as being consistent with the interests of the general membership.

I enclose, for the information of the membership, a letter from Mr. Dean to which are attached a memorandum summarizing the significant provisions of the proposed Consent Order and a copy of the press release issued by the Department of Justice containing an announcement by Attorney General William P. Rogers when the proposed Consent Order was filed with the Court.

The Society will be glad to answer any questions which any of the members may have with respect to the proposed Consent Order.

Sincerely yours,

STANLEY ADAMS, *President*

[fol. 182a] SULLIVAN & CROMWELL

48 Wall Street, New York  
July 21, 1959

Mr. Stanley Adams, President,  
American Society of Composers,  
Authors and Publishers,  
575 Madison Avenue,  
New York 22, N. Y.

Dear Mr. Adams:

I enclose a memorandum with respect to the proposed Consent Order to be submitted to Chief Judge Ryan on October 19, 1959, which would further amend the Amended Final Judgment of March 14, 1950 in the action *United States of America v. American Society of Composers, Authors and Publishers et al.* This memorandum summarizes the provisions of the proposed Consent Order in terms of their effect on the members of the Society.

Also enclosed is a copy of the press release issued by the Department of Justice on June 29, 1959, at the time the proposed Consent Order was filed with the Court.

I recommend that the Society circulate both of these documents generally to the members of the Society, as soon as possible, so they will have the information for some time in advance of the hearing before Chief Judge Ryan.

Very truly yours,

ARTHUR H. DEAN

(Enclosures)

[fol. 182b]

Memorandum prepared for the information of the members of ASCAP, with respect to the proposed Consent Order to be submitted to Chief Judge Ryan on October 19, 1959

The action *United States of America v. American Society of Composers, Authors and Publishers, et al.*, Civil Action No. 13-95, was commenced in the United States District Court for the Southern District of New York 18 years ago on February 26, 1941 when the Department of Justice filed a complaint alleging that the Society was operating in violation of the Federal Antitrust laws. On March 4, 1941, a consent judgment was entered containing certain limitations upon future activities of the Society.

This judgment was amended by consent on March 14, 1950. The amended judgment, which will be referred to as the "Judgment" is currently in effect.

The Department of Justice some time ago advised the Society that it would seek an order construing and enforcing the Judgment and requiring certain changes in the rules and practices of the Society. After a series of negotiations between the Department and the Society, the proposed Consent Order was drafted, and has been approved by the Government and unanimously approved and endorsed by the Society's Board of Directors.

At the hearing before Judge Ryan to be held October 19, 1959, the proposed Consent Order will be presented to the Court for approval and signature.

Pursuant to the order of Judge Ryan, the Society has already sent each member the following documents:

1. Notice of Hearing before Judge Ryan on October 19, 1959.
2. Amended Final Judgment dated March 14, 1950.

[fol. 182c] 3. Proposed Consent Order, with Attachments A, B and C thereto.

4. Proposed Writers' Distribution Formula.
5. Proposed Weighting Formula.

The Consent Order covers the following subjects:

- (i) Compensation to resigning members for performances of works which continue to be licensed by the Society;
- (ii) A scientific survey of performances on the various media such as network radio, local radio, network television and local television;
- (iii) Distributions to writer members;
- (iv) Distributions to publisher members;
- (v) Weighting of credit awarded compositions for uses as themes, jingles, background music or cue or bridge music;
- (vi) Allocation of votes among the writer and publisher members of the Society;
- (vii) Distribution of receipts from foreign societies;
- (viii) Information to members and complaint procedures; and
- (ix) Admission to membership.

The proposed Consent Order contains provisions with respect to each of the above matters. The following is a brief description of the changes which would follow the approval of the proposed Consent Order and the amendment of the Articles of Association:

[fol. 182d]

#### I. RESIGNING MEMBERS

A resigning member shall continue to receive distributions from the Society for performances under licenses granted prior to his resignation so long as no other performing rights licensing organization has the right to license the performance of such works in the United States, as well as for the performances occurring while the Society continues to have the right to license his works in the United States because of the continued membership in the Society of a publisher or co-writer of such work and no other performing rights organization has such right.



## II. THE SURVEY

ASCAP will survey performances of its members' works in accordance with a scientific survey designed by independent experts.

A. *Network Programs.* The Society will continue to obtain logs of all programs on the three major television networks and all commercial programs on the two radio networks from which ASCAP receives the most revenue. (Radio network sustaining programs other than certain serious music programs will be sampled in the local survey.) The number of credits awarded for network performances will depend on (1) the revenue received by the Society from the networks (taking into consideration the value of local spot announcements adjacent to and reasonably attributable to network programs) and (2) the number of stations hooked into the emanating program.

B. *Local Programs.* Local radio and television programs will be sampled by the Society by a random sample of local stations. Each sample will consist of a tape recording of three continuous hours of broadcasting. It is proposed to increase by at least 50% the number of samples presently being taken in the local radio survey.

[fol.182e] For purposes of sampling, the country will be divided into a number of geographic areas. Each area will be subdivided for sampling purposes into groups of stations, depending upon the revenue received by ASCAP. The number of samples allocated to each sampling unit will be in proportion to the revenue which ASCAP receives from the stations in the sampling unit.

The credits awarded for performances reflected by the sampling will be determined scientifically by the application of two factors:.

(i) The depth of sampling, i.e., the relationship between the number of hours being sampled in any sampling unit to the total number of hours that the stations in the sampling unit are on the air, and

(ii) The average revenue which ASCAP receives from the relevant group of stations, in relation to

ASCAP's total revenue from local radio or local television licensees. (For convenience, stations will be grouped into revenue bands, e.g., stations paying the Society between \$5,000 and \$10,000 per year will all be grouped and treated alike.)

Application of these two factors will determine the number of performance credits awarded to a performance reflected by the local survey.

C. *Changes in Revenue Distribution.* It is anticipated that credits attributable to network radio performances will, in the future, be substantially reduced, and the credits attributable to local radio will be correspondingly increased, to reflect the percentages of the total radio revenue of the Society attributable to the two sources. Aggregate credits for network television and for local television will respectively reflect the relative income of the Society attributable to those sources.

[fol. 182f] D. *Review of Survey.* The survey will be periodically reviewed by an independent expert to be appointed by the Court. The Government has reserved the right to seek additional relief with respect to the proposed survey if it has not been conducted in accordance with scientific principles or if the local sample is not of sufficient size or accuracy to permit a reasonably accurate distribution of the Society's revenues on the basis of its results. In any such proceeding, the Society may ask the Court to take into account the added cost of an increase in the sample size.

The foregoing represents a very general layman's description of the new survey, the details of which are necessarily highly technical, and, in some instances, remain to be finally worked out. To describe such details in full would be to attempt to write a treatise on the mathematics of sampling and the mathematical laws of probabilities.

### III. DISTRIBUTION TO WRITERS

The proposed Consent Order requires a number of changes in the present system of writer distribution. The

principles governing writer distribution are set forth in Section III and in Attachment A of the proposed Consent Order. The detailed distribution system is set forth in the Writers' Distribution Formula, which the Consent Order provides is initially in compliance therewith.

*A. Current Performance Fund.* The Society will continue to distribute 20% of the writers' distributable revenue through the Current Performance Fund.

*B. Average Performance Fund.* This fund replaces the former Sustained Performance Fund. 30% of the writers' distributable revenue will be distributed on the basis of each writer's five-year average of performance credits. (Members will no longer have an option to select a ten-year average.) For most writer members, average performance [fol. 182g] points will be determined simply by dividing the member's five-year average of performance credits by a specified figure (initially, 40). In Classes 975 and above, an increasingly large number of average performance credits per point will be required (for example, a minimum of 50 credits per point in Class 1000, a minimum of 114 credits per point in Class 1100, etc.), continuing the present practice of the Society. Below Class 975, promotions in classification will be spread over two years and demotions will be spread over three years, except that there is a four-year transition period for demotions from the present Sustained Performance Fund classifications.

*C. Recognized Works Fund.* This fund replaces the former Availability Fund and will be computed in the same fashion as the Average Performance Fund (including limitations on promotions and demotions) except that performance credits will be awarded only on the basis of works which have appeared in the Society's survey after the expiration of four quarters commencing with the quarter in which a performance of the work was first recorded in the Society's survey.

*D. Membership Continuity Fund.* This fund replaces the former Seniority Fund. Distribution will be based on continuous quarter years of membership (not to exceed 42

years) multiplied by the writer's average performance points.

**E. *Current Performance Election.*** For members not wishing to receive distribution through the four funds described above, an option is provided in the proposed Consent Order to receive distribution on a current performance basis, i.e., a writer electing the current performance basis will receive the same percentage of the writers' total distributable revenues (after providing for special awards under Section VI below, page 12 of this memorandum) as the [fol. 182h] number of his current performance credits bears to the total number of current performance credits of all writer members. There is a limitation, however, that such election may be withheld from the approximately 100 writers with the highest five-year averages of performance credits. So long as such election is withheld, there is a further limitation that, for credits above 39,000 (or such higher limit as the Society may determine), the member will receive distribution through the four funds described above.

**F. *Writers in Classes 975 and Above.*** At present, except for the Current Performance Fund, the number of performance credits per classification point increases in Class 975 and above. The result is that writers with the highest number of performance credits receive a reduced distribution per performance credit, and the amount of reduction increases with each increase in classification. The application of this principle has resulted in an increased distribution to the vast majority of the writer members.

The continuance of this principle, and the withholding from these writers of the current performance election, will depend upon the consent of a majority (both in number of members and in number of average performance credits of members) of the writer members so affected who vote in a special election to be held for this purpose after the entry of the proposed Consent Order. If the result of the vote is to approve the continuation of the present principle, future opportunities to vote on further continuance are provided.

#### IV. DISTRIBUTION TO PUBLISHERS

The proposed Consent Order requires a number of changes in the present system of publisher distribution.

A. *Current Performance Fund.* Initially, 55% of the publishers' distributable revenue will be distributed on the [fol. 182i] basis of current performance credits. Starting with the October 1960 distribution, the amount distributed through this fund will increase at the rate of 3% per year until it reaches 70% in October 1964.

B. *Recognized Works Performance Fund.* 30% of the publishers' distributable revenue will be distributed on the basis of works performed after the expiration of four quarters commencing with the quarter in which the performance of such work was first recorded in the Society's survey. Distribution will be based on such credits received in the latest available preceding fiscal survey year, rather than on a five-year accumulation as at present.

C. *Membership Continuity Fund.* Distribution from this fund will be based upon the number of continuity points of each publisher, determined by multiplying its quarters of membership by the performance credits received by such publisher. Initially, 15% of the publishers' distributable revenue will be distributed from this fund. Starting with October 1960, this will be decreased at the rate of 3% per year until the fund is discontinued in October 1964.

D. *Current Performance Election.* Any publisher member may elect, as provided in the proposed Consent Order, to receive distribution solely on a current performance basis. For the fiscal survey year starting October 1, 1959, an electing publisher will receive 75% of what it would have received if all publisher distributions for that year had been made solely on a current performance basis. This percentage increases by 5% per year until it reaches 100% for fiscal survey years starting October 1, 1964 and thereafter.

#### V. WEIGHTING OF PERFORMANCES

The plan for weighting performances is contained in two documents which the members have already received, one



[fol. 182j] entitled "Weighting Rules", appearing at pages 29-34 of the proposed Consent Order, and the other entitled "Weighting Formula", appearing as a separate document. The "Weighting Rules" constitute the principles to which the "Weighting Formula" must conform. The "Weighting Formula" spells out in detail the manner in which performance credits are to be awarded.

The proposed Consent Order will require changes in the present weighting of performances of works as themes and jingles and as background, cue and bridge music. The variation between maximum and minimum credit for such uses will be reduced substantially. Furthermore, a new test will be adopted to qualify a work for maximum credit for such uses, such test to be based on the work's history of prior performances other than as a theme or jingle or as background, cue or bridge music.

A. *Feature Performance*. All uses except those credited as themes, jingles, background music or cue and bridge music (as defined in Section A of the Weighting Formula) are described as "feature performances". Each feature performance of a work will be awarded full credit, except that (i) each repeated use of the same work on a single program will receive only one-tenth credit, with a maximum of two full credits for any single program and (ii) credit will not be allowed for more than eight feature performances per quarter hour.

B. *Themes*. A "qualifying work" (as this term is defined in paragraph F below), when used as a theme, will be awarded full credit (or 75% or 50% or 25% credit, depending upon its past history of feature performances) for all such uses within the first hour of any two hour period, and one-tenth of the applicable credit for all additional such uses during the second hour. A non-qualifying work used as a theme will receive one-tenth credit for all such uses within the first hour of any two-hour period and [fol. 182k] 1% credit for all additional such uses during the second hour. Musical works (other than jingles) used in conjunction with a commercial announcement will receive the same credit as a theme.



C. *Jingles*. A jingle is defined as a musical message containing commercial advertising matter where (i) the musical material was originally written for commercial advertising purposes or (ii) the performance is of a musical work, originally written for other purposes, with the lyrics changed for commercial advertising purposes with the permission of the member or members in interest. Only 1% credit will be awarded for all uses of a work as a jingle during the first hour of any two hour period and 1/10 of 1% for all such uses during the second hour. When an advertiser obtains special permission of the members in interest, compensation can be obtained by such members directly from the advertiser.

D. *Background Music*. A qualifying work used as background music will receive full credit or one-half credit depending on its history of prior feature performances. Non-qualifying works will receive 20% credit if they have been commercially published for general public distribution and sale, if commercial recordings have been made as "singles" for general public distribution and sale, and if five feature performances of the work have been recorded in the local radio sample survey in the five preceding fiscal survey years. For each repeated use on a single program, only one-tenth of the credit provided above will be awarded, with a maximum of two times the credit awarded for the initial performance.

Other non-qualifying background music on each program will receive, for each three minutes' duration in the aggregate for that program, 20% credit; fractions of three minutes will be computed on the basis of 5% for each 45 seconds or major fraction thereof.

[fol. 182 i] E. *Cue and Bridge Music*. A qualifying work used as cue or bridge music will receive 10% credit for all uses during the first hour of any two-hour period and 1% credit for all such uses in the second hour. A non-qualifying work will receive 1% credit for all uses during the first hour and 1/10 of 1% credit for all such uses in the second hour.

**F. Qualifying Works.** A qualifying work is one which has (i) an accumulation of 20,000 feature performance credits since January 1, 1943 and (ii) an accumulation of 2,500 feature performance credits during the five latest available preceding fiscal survey years, toward which not more than 750 credits shall be counted for any one year.

Works first performed before January 1, 1943 shall be presumed to have accumulated 20,000 feature performance credits if the title of such work appears in the book *Variety Music Cavalcade*, or among the top ten on the "Lucky Strike Hit Parade" or the top ten on the weekly list of the most popular songs published in *Variety* or *Billboard*. Reference may also be made to the same sources for works first performed between January 1, 1943 and October 1, 1955, when the Society's records started to distinguish between feature and non-feature performances.

A work which has accumulated 2,500 feature performance credits in the five latest available fiscal survey years can receive 75%, 50% or 25% credit when used as a theme if it has accumulated 15,000, 10,000 or 5,000 feature performance credits, respectively, since January 1, 1943, or 50% credit when used as background music if it has accumulated 10,000 feature performance credits since January 1, 1943.

There are special provisions for works first performed within the five preceding fiscal survey years, as well as for adjustment of the qualifying number of feature performance credits in years when the total of all ASCAP performance credits recorded in the Society's survey was less than 20,000,000 or more than 30,000,000.

**G. General Limitations.** The Weighting Formula contains limitations on the total credit to be awarded any work when used in different ways in any two-hour period, such as performances both as background music and as a theme, etc. There is also a general limitation permitting not more than 5% credit in the aggregate for all works (except feature performances) performed on a dramatic program of 15 minutes or less which is presented in serial form two or more times weekly.

## VI. SPECIAL AWARDS

The writer members of the Board of Directors may allocate an amount not exceeding 5% of the writers' total distributable revenue for the purpose of making special awards to writers whose works have unique prestige value for which adequate compensation would not otherwise be received by such writers, and to writers whose works are performed substantially in media not surveyed by the Society. The distribution of such awards will be determined by an independent panel appointed for that purpose by the writer members of the Board of Directors. Thirty days prior to payment of any such awards, the Society shall send to all of its writer members a list of all award recipients and the amount awarded to each.

## VII. SYMPHONIC AND CONCERT WORKS ETC.

Works which require four minutes or more for a single, complete rendition thereof, and which in their original form were composed for a choral, symphonic, or similar concert performance (including chamber music), will receive the [fol. 182n] following credit when performed for the periods of time indicated:

<u>Minutes of Actual Performance</u>	<u>The Otherwise Applicable Credit Is Multiplied by:</u>
4:00 - 5:30	2
5:31 - 10:30	5
10:31 - 15:30	9
15:31 - 20:30	14
21:31 - 25:30	20
Each additional five minutes or part thereof	add 8

A. The license fees which the Society receives from concert and symphony halls will be multiplied by five in determining the credit to be awarded for performances of works in concert and symphony halls.

B. Performances on national radio network sustaining programs consisting of concerts by symphony orchestras which are presented as a genuine contribution to the culture of the nation will be awarded credit equal to performances on a radio network of 50 stations.

### VIII. FOREIGN REVENUE

If the revenue which the Society receives from any foreign source exceeds \$200,000, and to the extent that the reports furnished by such source allocate credit among the members of the Society and among compositions in reasonably identifiable form, distribution of the revenue from such foreign source will be made separately on the basis of such reports. This would include Canada, England, Sweden, and the non-film revenue received from France and Germany. Other revenue received from foreign sources will be distributed [fol. 182q] on the basis of the Society's most reliable information as to foreign performances generally.

### IX. VOTING

A. Each writer member and each publisher member of the Society is limited to a maximum of 100 votes. The number of votes of a member will no longer be based on the amount of money he received from the Society in the preceding year but will be based solely on the performance credits received by him during the latest available fiscal survey year. Votes will be awarded on a sliding scale, as follows:

(1) *Writer Members*: Each writer member who has received any performance credits in the latest available preceding fiscal survey year shall have one vote, plus (i) one vote for each 1,000 credits up to 20,000 credits, plus (ii) one vote for each 2,000 credits from 20,001 to 26,000 credits, plus (iii) one vote for each 3,000 credits from 26,001 to 35,000 credits, plus (iv) one vote for each 4,000 credits from 35,001 to 51,000 credits, plus (v) one vote for each 5,000 credits from 51,001 to 101,000, plus (vi) one vote for each 6,000 credits in excess of 101,000 credits, with a maximum of 100 votes.

(2) *Publisher Members*: Each publisher member who has received any performance credits in the latest available preceding fiscal survey year shall have one vote, plus (i) one vote for each 4,000 credits up to 100,000 credits, plus (ii) one vote for each 8,000 credits from 100,001 credits to 140,000 credits, plus (iii) one vote for each 12,000 credits from 140,001 to 200,000 credits, plus (iv) one vote for each 16,000 credits from 200,001 to 408,000, plus (v) one vote for each 20,000 credits in excess of 408,000 credits, with a maximum of 100 votes.

[fol. 182p] B. The above formulas will be adjusted for increases or decreases in the total number of performance credits recorded by the Society. Furthermore, if at any time there is an increase of more than 10% in the percentage of the total publisher votes represented by the ten publisher members and "groups of affiliated publisher members" having the highest number of "publisher votes, the publishers' voting formula will be adjusted to bring such publishers within 10% of such percentage.

C. In any election for the Board of Directors the nominees shall include any person eligible to be a director who is designated by a petition subscribed to by 25 or more members entitled to elect such director.

D. Any group of writer members entitled to cast one-twelfth of the votes of all writer members may elect any eligible person a director by signing and presenting a petition to that effect 90 days before any scheduled election of directors. If that occurs, the number of writer directors to be elected in the general election will be reduced accordingly and the members signing the petition will not be entitled to vote in the general election. A member may not sign more than one such petition. Similar provision is made for electing publisher directors.

## X. INFORMATION PROCEDURES

A. Anyone who has been a member of the Society for one year may inspect a current list of members and their mailing addresses.

3. Each year the Society will prepare alphabetical lists of compositions receiving performance credits and the number of credits received by each during the preceding year. 4. as to each composition which received credits as themes, background music or cue and bridge music, the [ol. 182q] Society will maintain records showing the number of feature performance credits received by each during the preceding five years. Any member or his authorized agent may inspect these lists and records with respect to his own compositions, and may inspect other portions thereof to the extent that inspection is sought in good faith connection with any financial interest of such member or a member. All other records relating to distribution will be open for inspection for good cause.

#### XI. COMPLAINT AND APPELLATE PROCEDURES

A special board, elected in the same manner as the Board of Directors, will be established with jurisdiction in the first instance over every complaint by a member relating to his distribution or to any rule or regulation directly affecting distribution to him. Any such complaint must be filed within three months after receipt of the annual statement or the rule or regulation on which the complaint is founded. A direct appeal may be taken from a decision of the special board to an impartial panel of the American Arbitration Association, which may rule on the interpretation or application of any order, rule or regulation, rectify errors, or void rules or regulations of discriminatory or arbitrary character.

#### XII. RETROACTIVE ADMISSION OF MEMBERSHIP

Any person previously denied admission to membership may have his application reconsidered and, if his previous application should have been accepted, his membership shall be retroactive to the date of the original application or March 14, 1950, whichever is later.

#### [ol. 182r] XIII. CONSENT OF MEMBERSHIP

It will be noted that the proposed Consent Order has been approved and consented to by the attorneys for the Depart-



ment of Justice and by the attorneys for the Society. The attorneys for the Society signed this document with the unanimous approval of the Board of Directors.

However, certain provisions of the proposed Consent Order cannot be made effective without amendment of the Society's Articles of Association and any such amendment must be voted by the membership under the voting rules now in effect. Thus, it will be necessary for the membership to approve amendments which would bring the Articles of Association into conformity with the proposed Consent Order. If the proposed Consent Order is signed by the Court, the amendments will be submitted to the membership for voting within three months thereafter and the Board of Directors will unanimously recommend approval by the membership.

If the amendments are not approved by the membership, the Consent Order will be nullified and vacated, and the questions raised by the Department of Justice will have to be litigated.

#### XIV. GENERAL

There has been summarized above the more significant provisions in the proposed Consent Order, as well as the Writers' and Publishers' Distribution Formulas and the Weighting Formula which will be put into effect if the Consent Order is approved. To keep this summary within reasonable limits, reference has not been made to every provision in these documents. It is therefore recommended that these documents be read in full by each member.

[fol. 182s] The Board of Directors, with the advice of counsel, has approved the proposed Consent Order in order not to have to litigate whether the Society's current practices and policies with respect to the matters discussed above comply with the 1950 Amended Final Judgment of the Court, and because, in the Board's judgment, the contemplated changes are consistent with the interests of the general membership of the Society.

ARTHUR H. DEAN

July 21, 1959

## [fol. 182t] DEPARTMENT OF JUSTICE

FOR IMMEDIATE RELEASE  
MONDAY, JUNE 29, 1959

Attorney General William P. Rogers today announced the filing in the Federal District Court in New York City of a proposed Order directing the American Society of Composers, Authors and Publishers (ASCAP) to carry out in certain specific, detailed ways the terms of an antitrust judgment entered against the Society in 1950. ASCAP is composed of approximately 1,200 publishing concerns and 4,000 authors and composers. The terms in question related basically to the rules and regulations of ASCAP governing the distribution to its members of over \$28,000,000 annually which the Society receives from licensing the commercial use of the copyrighted music composed or published by its members. These licenses are to the radio and television industry and the more than 25,000 other users such as hotels, bars, skating rinks and restaurants.

At the time the proposed order was submitted to the Court it was pointed out that ASCAP after pre-filing negotiations had agreed to the terms of the order. The Court entered an order requiring the parties on October 19, 1959 to show cause why the proposed Order should be entered and directed ASCAP to mail a copy of the proposed Order to each member and the members may then make application to be heard pursuant to the terms of the show cause order.

The practices which the proposed order seeks to remedy, relate to six fundamental factors. These factors relate to the conduct of ASCAP in its dealings with its members or concern the manner in which it divided the amounts of its revenues due its publisher and writer members.

[fol. 182u] Thus:

(1) The proposed order requires that ASCAP pay resigning members on the same basis as others when the Society continues to license their works. Resigning members are thus permitted to continue licensing existing copyrights

through ASCAP when a co-writer or publisher is also licensing the same work through ASCAP. But the resigning member is free to license new works through another organization.

(2) ASCAP would be ordered to conduct a scientific census or sample of performance of its members' compositions. The results of the survey must be weighted in proportion to what the Society receives from the licensees where the surveyed performances occurred. A provision is included to permit re-examination by the Court of the survey after 18 months of operation. A court appointed expert will report to the Court and the Government on the design and operation of the survey and will prepare estimates of the accuracy of the samples of performances.

(3) Each ASCAP writer would be given an option to receive payment based on the results of the survey or in the alternative to receive payment based on such factors as a five year average of performances of "recognized works" and on the length of time the writer has been a member of ASCAP. (A "recognized work" is defined as one which has received performance credit in the ASCAP survey at least one year prior to the performance in question). The proposed order seeks to assure the maximum feasible area of individual choice. An exception from these options is made for the top one hundred writers in ASCAP. These writers may vote to deny themselves the option to receive payment on a per performance basis.

Each publisher member would be given an option to receive payment on the basis of the results of the survey. In the alternative, a publisher may take into account the length [fol. 182v] of his ASCAP membership and the number of performances of his "recognized works".

The order contains detailed provisions governing payment for theme songs, background music on dramatic programs, advertising jingles, copyrighted arrangements of works in the public domain, and serious compositions of more than three minutes duration.

(4) ASCAP would be directed to weight the votes of its members, if at all, only on the basis of the performance

credits which they received in the survey. No member may have more than 100 votes. This is in sharp contrast with the existing practice where the publisher members having the most votes in 1957 had 1,469 votes and the writer member having the most votes in that year had 5,116 votes. A progressively higher number of performance credits is required for each vote above twenty. Provision is made to permit a minority of one-twelfth to elect a director. The ten largest groups of affiliated publishing firms are limited to a maximum of slightly less than forty-one percent of the total publisher vote.

(5) ASCAP would be ordered to keep certain records and make them available to any member upon various conditions. ASCAP must make the addresses of its members available to other members and it must inform the membership of all changes in its rules affecting distribution to the members. Provisions are included designed to speed up direct appeals to the impartial panel of arbitors. Other procedural safeguards are included to protect the rights of members in these appeals.

(6) ASCAP would be required to admit all qualified applicants for membership and to publicize the qualifications for membership twice a year in certain trade papers.

[fol. 183]

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

APPLICANT'S NOTICE OF MOTION RETURNABLE SEPTEMBER 1, 1959, FOR AN ORDER DIRECTING THE PLAINTIFF TO ANSWER "INTERROGATORIES," THE SUPPORTING AFFIDAVIT OF HERBERT CHEYETTE DATED AUGUST 25, 1959, THE EXHIBITS THERETO AND THE MEMORANDA ENDORSED ON SAID MOTION BY CHIEF JUDGE RYAN AND JUDGE DIMOCK

SIRS :

Please Take Notice that upon the annexed affidavit of Herbert Cheyette, attorney for Sam Fox Publishing Company, Incorporated, a party who has an interest affected by these proceedings, and on behalf of all other parties similarly situated, sworn to the 25th day of August, 1959 with Exhibits A and B thereunto annexed, the order of this Court dated June 29th, 1959 and the proposed consent further amended Final Judgment herein, the undersigned will move this Court on the 1st day of September, 1959 at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, in Room 506 of the United States Courthouse, Foley Square, in the Borough of Manhattan, City of New York, for an order pursuant to Rule 37 directing the plaintiff to answer the interrogatories listed below:

*Interrogatories*

1. With respect to provision III-E of the proposed order (p. 8):

A How many foreign societies furnish remittances of more than \$200,000.00 per year to ASCAP?

a. If any, name them.

b. If any, state the number of years the remittances have been more than \$200,000.00.

**B How many foreign societies make remittances to ASCAP?**

[fol. 184] 2. With respect to provision IV-B of the proposed order (pp. 9 ff.)

Using the last annual ASCAP remittances to publishers as a basis with respect to the proposed new publishers voting formula, state the following:

- a. The number of votes that will be cast by each of the publisher members and affiliated publishers now represented on the Society's Board of Directors? What percentage of the total possible vote will said Board of Directors and affiliated publishers control?
- b. State the number of votes capable of being cast by the 50 publishers receiving the greatest distribution from the Society. Indicate which, if any, of these 50 publishers are affiliated with each other.
- c. State the total number of publishers who will have one vote.
- d. State the total number of votes capable of being cast.
- \*e. With respect to the election of the Board of Directors by the writers and publishers, respectively, for the past 9 years, provide a breakdown and tabulation indicating the total possible vote in each election and the votes actually cast.
- \*f. What percent of the publishers' total distribution of revenue was received by board publisher members and their affiliates during the last five years.

3. With respect to provision IV-E of the proposed order (p. 10):

- a. Excluding the publishers represented on the Board of Directors and their affiliated compa-



nies what is the minimum number of publishers that will be capable of combining so as to constitute one-twelfth of the total possible vote.

\*b. Under the cumulative voting procedure provided in IV-E when is it assumed that any group will learn:

1. The number of votes they are entitled to as individuals.
2. The percentage their combined ballots constitute of the total possible vote.

4. With respect to provision IV-B of the proposed order (p. 9):

- a. State the number of years each of the publishers currently represented on the Board of Directors, has had a representative on the Board of Directors.

[fol. 185] 5. With respect to the proposed "Weighting Rules", Section 5-B (p. 32):

Of the 377 works owned by publishers represented on the Society's Board of Directors being used as themes and having accumulated 20,000 credits as of April 2, 1958, according to the ASCAP affidavit "A-14" in the appendix to the record of the hearings before Sub-Committee No. 5 of the Select Committee on Small Business, House of Representatives, page 538, question 9, how many of these works accumulated their 20,000 credits in the two years first succeeding the first performance recorded in the ASCAP survey?

6. With respect to the proposed "Weighting Rules", Section 5-B (p. 32):

For each year beginning January 1, 1943 state—

- a. The type of survey employed by ASCAP, if any.
- b. The media surveyed, if any.

- c. The type of sample, if any.
- d. The data taken, if any.
- e. Type of records kept and presently extant in the files of the Society.

State generally the information and data shown in the above records with respect to each of the years in question.

7. With respect to the proposed "Weighting Rules", Section 5-B (p. 32):

What is the first date on which ASCAP surveyed the following:

- a. Local radio stations.
- b. Network radio stations.
- c. Local TV stations.
- d. Network TV stations.
- e. What is the date on which a procedure was first instituted whereby reference tapes were taken on a continuing basis of performances in each of the above?
- f. What is the date on which an objective sample was first instituted by the Society?
- [fol. 186] g. With respect to the media mentioned above, what is the date on which types of uses were first indicated in the ASCAP survey?
- h. With respect to the media mentioned above, what is the date on which duration of performance was first indicated?
- i. What is the significance of the dates January 1, 1943? October 1, 1955?

\*8. With respect to the proposed "Weighting Rules" section 5-B (p. 32):

What percent of the ASCAP income has been distributed during the past five years by reason of:

- a. Featured performance.
- b. Themes.
- c. Jingles.
- d. Background music.
- e. Cue and bridge music.

What percent of the logged performances in the ASCAP survey are attributable to the above?

9. With respect to the proposed "Weighting Formula" provision F (p. 10):

What percent of the uses in the following media are "live" and what percent "recorded", according to the current ASCAP survey?

- a. Radio network.
- b. Local radio.
- c. TV network.
- d. TV local.

all of which interrogatories except those indicated by an asterisk were communicated to plaintiff on July 14th, 1959. With respect to the above interrogatories, it is not necessary to mention any publisher by name.

[fol. 187] The undersigned will further move the court to direct that Joel Dean be available to testify at the hearing to be held in this proceeding on October 19th, 1959.

The undersigned alleges that each of the foregoing interrogatories will elicit evidence relevant and material to the matters involved in the above action and that such evidence is in the sole possession, custody or control of the parties to this proceeding, and is not available to interested parties from any other source.

The undersigned further alleges that Joel Dean was hired as an expert by the defendant with the consent of the plaintiff, to design the proposed new survey provided for in paragraph II-A of the proposed judgment and that he is

the sole person capable of giving testimony as to its effectiveness.

Dated, August 25th, 1959.

Yours, etc.

Herbert Cheyette, Attorney for Sam Fox Publishing Company, Incorporated, Office & P. O. Address, 11 West 60th Street, New York, N. Y.

To:

William D. Kilgore Jr. Esq., Antitrust Division, Department of Justice, Washington, D. C.

Sullivan & Cromwell, Esqs., Attorneys for Defendants, 48 Wall Street, New York, N. Y.

[fol. 188]

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
Civil Action No. 13-95

UNITED STATES OF AMERICA, Plaintiff,  
—against—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS  
AND PUBLISHERS, et al., Defendants.

AFFIDAVIT

State of New York,  
County of New York, ss.:

Herbert Cheyette, being duly sworn, deposes and says:

He is the attorney for Sam Fox Publishing Company, Incorporated. Said company is a charter publisher member of ASCAP.

Pursuant to the order of this Court dated June 29th, 1959, there will be found attached hereto as Exhibit A, a notice by this publishing company, as a party with an interest affected by this proceeding, of its intention to appear be-

fore this Court on October 19th, 1959 to be heard why the proposed consent further amended Final Judgment will not accomplish the antitrust purposes of this suit.

In or about the first week of July, 1959 deponent communicated with the office of the Hon. Sylvester J. Ryan by telephone. Deponent was informed by said Judge's law clerk that the Judge did not intend to confer with any party with "an interest affected by these proceedings" before the hearing to be held October 19th, 1959. Said clerk did in-[fol. 189] form deponent, however, that any question would be relayed to the Judge and an answer provided if required. Deponent thereupon informed the clerk that analysis of the proposed consent further amended Final Judgment revealed that without question it had been based upon data furnished by ASCAP to the Department of Justice, which data was solely within the knowledge of these two parties, and not available to any of ASCAP's members. Nevertheless the order of the Court dated June 29, 1959 provides:

"ORDERED that any party or individual who has an interest affected by these proceedings may appear at such hearing and make application to be heard upon the ground that the proposed consent further amended Final Judgment will not accomplish the antitrust purpose of this suit."

Deponent therefore stated that it would be impossible for said other parties or individuals with an interest affected by these proceedings to give this Court an informed opinion as to whether the proposed consent further amended Final Judgment will accomplish the antitrust purposes of this suit unless the facts furnished by ASCAP to the Department of Justice were made available for study prior to the hearing. In the absence of such information being placed on file in this court, as is the universal practice in proceedings judging the compromise of derivative stockholders' actions, to which the hearing on October 19th is analogous, the order providing for the appearance of interested parties would be rendered nugatory, for interested parties, deprived of said information, would be required to analyze the proposed judgment without evidence, there being no record whatsoever. Deponent therefore requested

to know what proceedings might be instituted in order to obtain the information necessary to evaluate the proposed [fol. 190] judgment.

Thereafter, some time later the same day, deponent was informed by said law clerk that his question had been communicated to the Judge and that deponent might be advised to request the desired information from the Justice Department by letter. Should that information be refused by the Department, deponent might then make a motion before this Court to compel answers to said interrogatories.

Pursuant to this suggestion, on July 14th, 1959 a registered letter, a copy of which is annexed hereto as Exhibit B, was sent to the Department of Justice. This letter contains an itemized request for answers to interrogatories, which interrogatories contain specific reference to the provisions of the proposed consent further amended Final Judgment to which they pertain.

*As of the date of this affidavit, receipt of said letter has not been so much as acknowledged by the Department of Justice, though deponent has a post office certificate of its delivery.*

On July 29th, 1959, before leaving on vacation, deponent, not having received any answer from the Department of Justice, telephoned to inquire what position the Department intended to take with respect to his request for information. Deponent was informed that his letter had been received and that the Department had agreed that deponent was entitled to all the information requested, which information, the Department stated, it had in its possession. Nevertheless, the Department added, it had to obtain ASCAP's consent to furnish it to deponent. Such a meeting was then [fol. 191] scheduled for the following week, but the Department was sure such information would be sent to deponent by August 7th:

Deponent returned from his vacation on August 17th to find that no such information had been forthcoming. On said date deponent again called the Department of Justice. This time deponent was told that his request had been communicated to ASCAP, without indication of its source, the first week in August and that ASCAP had in turn promised to supply the information to all interested parties, provid-



ing it could devise a means for doing so outside the court. ASCAP, the Department stated, had taken the position that it would not furnish any information before this Court by reason of the belief that such information could then be used as prima facie evidence in a private lawsuit for treble damages under the antitrust law. The Department further stated that it had not heard from ASCAP again on the matter until that very morning, when it was informed that Mr. Arthur Dean would answer all of deponent's interrogatories in a speech to be delivered to the ASCAP west coast membership on August 18th, and to the Society's east coast membership on August 27th.

*The Justice Department did not bother to inform deponent why it was necessary for ASCAP to furnish this information if the Department had it already, as the Department had stated to deponent on July 29th, 1959.*

On Friday, August 21st, the Department stated that it had no indication that deponent's request for information had been answered by ASCAP in any way whatsoever on [fol. 192] the West Coast or anywhere else. The Department further informed deponent on this date that it would finally acknowledge receipt of his original letter on July 14th, 1959 requesting the information and that it would not oppose any motion to have such requested information produced. Again the Department made no effort to inform deponent why, if it had the information, as it originally stated, and if it would not oppose a motion to have it produced, it nevertheless required a motion to be made, unless it feels that the position taken by ASCAP should be ruled upon by the Court.

Deponent respectfully wishes to state the dilatory tactics of ASCAP and the Department of Justice with respect to deponent's interrogatories have been both discourteous and farcical.

The proposed consent further amended Final Judgment is an extremely technical document dealing with a unique industry, of decisive importance to the economic well being of the members of ASCAP. Moreover this document will also be of decisive importance to the United States, for it will control, with respect to the matters to which it pertains, the government's future legal relationship to the Society. The explicit language of Rule 33 that "interroga-

ories shall be answered separately and fully in writing under oath" should not be flouted in a matter of such importance.

Surely if the proposed judgment is equitable and if it accomplishes the purposes for which it is designed, the parties should welcome the opportunity to produce the data supporting its conclusions. Surely ASCAP should not be permitted to closet the information upon which its members [fol. 193] are invited by this Court to give their opinion, on the ground that such information might be useful to hypothetical litigants in possible future lawsuits. The proposed consent further amended Final Judgment requires the closest possible scrutiny, scrutiny based on all available information. Such information must include written answers to deponent's interrogatories, placed on file in this Court and available during regular court hours for inspection by all interested parties, for such information is available nowhere else.

The Department of Justice is the appropriate party to provide such answers. The state of its knowledge with respect to the data with which the proposed judgment purports to deal is certainly as relevant to the efficacy of these provisions as the data itself. The Department of Justice has stated to deponent that it has the information requested and indeed it is inconceivable to imagine otherwise. Nevertheless should the Department be forced to admit in any instance that it does not possess the desired information, ASCAP should be directed to produce it.

Four of the interrogatories (denoted by an asterisk) in the annexed notice of motion were not contained in deponent's original letter to the Department. Nevertheless, since the relevancy of these added questions cannot be disputed and since neither of the parties has made any effort to supply the heretofore requested information, no prejudice can possibly result from their inclusion now.

Unless this Court compels the plaintiff to file written answers to deponent's interrogatories, there is absolutely no record on which the proposed consent further amended [fol. 194] Final Judgment may be evaluated by the parties or individuals with an interest affected by these proceedings, either with respect to said judgment's equity or to its impact under the antitrust laws.

## II.

The proposed new sampling technique provided for in paragraph II-A of the proposed judgment is based on studies conducted by Joel Dean, a statistician hired by Sullivan & Cromwell, defendants' attorneys, with the acquiescence and approval of the plaintiff. Mr. Dean, the designer of this sampling technique, should be required to be available as a witness at the hearing of October 19th, 1959. Certainly his testimony will be the best evidence as to its scope, intent and accuracy.

Wherefore deponent respectfully requests that an order be granted directing the plaintiff to provide written answers to the interrogatories propounded in the annexed notice of motion and that said answers be placed on file in this court for inspection by all parties with an interest affected by these proceedings, and that the Court further direct that Mr. Joel Dean appear as a witness at the hearing scheduled for October 19th, 1959.

Herbert Cheyette

Sworn to before me this 25th day of August, 1959. Minna Witkoff, Notary Public, State of New York, No. 03-4316000, Qualified in Bronx County, Commission Expires March 30, 1961.

[fol. 195]

EXHIBIT A TO AFFIDAVIT

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 13-95

UNITED STATES OF AMERICA,

Plaintiff,

—against—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS  
AND PUBLISHERS, et al.,

Defendants.

NOTICE OF APPEARANCE

Pursuant to the order of this court dated June 29th, 1959  
SAM FOX PUBLISHING COMPANY, INCORPORATED, a charter

publisher member of ASCAP, hereby declares its intention to appear by Herbert Cheyette, its attorney, at the hearing to be held on the 19th day of October, 1959 in the above entitled action, at the United States Courthouse, Foley Square, in the Borough of Manhattan, City of New York, at which time it will make application to be heard as a party who has an interest affected by these proceedings, upon the ground that the proposed consent further amended Final Judgment will not accomplish the antitrust purpose of this suit.

Dated, August 25th, 1959.

Yours, etc.

HERBERT CHEYETTE

*Attorney for Sam Fox Publishing  
Company, Incorporated*

Office & P. O. Address

11 West 60th Street,  
New York, N. Y.

To:

WILLIAM D. KILGORE JR. Esq.

*Antitrust Division*

Department of Justice  
Washington, D. C.

SULLIVAN & CROMWELL, Esqs.,

*Attorneys for Defendants*

48 Wall Street  
New York, N. Y.

[fol. 196]

## EXHIBIT B TO AFFIDAVIT

July 14, 1959

Mr. Robert Bicks  
Assistant Attorney General  
Department of Justice  
Washington, D. C.

Re: UNITED STATES vs. ASCAP  
Civil Action 13-95  
United States District Court  
Southern District of New York.

Dear Sir:

On behalf of the Sam Fox Publishing Company, Inc., a charter publisher member of the American Society of Composers, Authors and Publishers and a "party . . . who has an interest affected" by the proceedings in United States of America vs. American Society of Composers, Authors and Publishers, Civil Action 13-95, United States District Court, Southern District of New York, you are hereby requested to make available the following information with respect to the proposed order in the above entitled action so as to enable this party or any other party so interested to properly evaluate its terms. The purpose of this request is to enable this party or any other party to comply with the final paragraph of the order of the Honorable Sylvester J. Ryan, dated June 29, 1959, which reads as follows:

"Ordered that any party or individual who has an interest affected by these proceedings may appear at such hearing and make application to be heard upon the ground that the proposed consent further amended Final Judgment will not accomplish the antitrust purpose of this suit."

## INTERROGATORIES

1. With respect to provision III-E of the proposed order:
  - A. How many foreign societies furnish remittances of more than \$200,000.00 per year to ASCAP?
    - a. If any, name them.

- b. If any, state the number of years the remittances have been more than \$200,000.00.

**B. How many foreign societies make remittances to ASCAP?**

**2. With respect to provision IV-B of the proposed order:**

Using the last annual ASCAP remittances to publishers as a basis with respect to the proposed new publishers voting formula, state the following:

[fol. 197] a. The number of votes that will be cast by each of the publisher members and affiliated publishers now represented on the Society's Board of Directors? What percentage of the total possible vote will said Board of Directors and affiliated publishers control?

b. State the number of votes capable of being cast by the 50 publishers receiving the greatest distribution from the Society. Indicate which, if any, of these 50 publishers are affiliated with each other.

c. State the total number of publishers who will have one vote.

d. State the total number of votes capable of being cast.

e. Excluding the publishers represented on the Board of Directors and their affiliated companies what is the minimum number of publishers that will be capable of combining so as to constitute one-twelfth of the total possible vote.

**3. With respect to provision IV-B of the proposed order:**

a. State the number of years each of the publishers currently represented on the Board of Directors, has had a representative on the Board of Directors.



4. With respect to the proposed "Weighting Rules", Section 5-B"

Of the 377 works owned by publishers represented on the Society's Board of Directors being used as themes and having accumulated 20,000 credits as of April 2, 1958, according to the ASCAP affidavit "A-14" in the appendix to the record of the Hearings before Sub-Committee No. 5 of the Select Committee on Small Business, House of Representatives, page 538, question 9, how many of these works accumulated their 20,000 credits in the two years first succeeding the first performance recorded in the ASCAP survey?

5. With respect to the proposed "Weighting Rules", Section 5-B:

For each year beginning January 1, 1943 state—

- a. The type of survey employed by ASCAP, if any.
- b. The media surveyed, if any.
- c. The type of sample, if any.
- d. The data taken, if any.
- e. Type of records kept and presently extant in the files of the Society.

[fol. 198] State generally the information and data shown in the above records with respect to each of the years in question.

6. With respect to the proposed "Weighting Rules", Section 5-B:

What is the first date on which ASCAP surveyed the following:

- a. Local radio stations.
- b. Network radio stations.
- c. Local TV stations.
- d. Network TV stations.
- e. What is the date on which a procedure was first instituted whereby reference tapes were taken on a continuing basis of performance in each of the above?

- f. What is the date on which an objective sample was first instituted by the Society?
  - g. With respect to the media mentioned above, what is the date on which types of uses were first indicated in the ASCAP survey?
  - h. With respect to the media mentioned above, what is the date on which duration of performance was first indicated?
  - i. What is the significance of the dates January 1, 1943? October 1, 1955?
7. With respect to the proposed "Weighting Formula" provision F:
- What percent of the uses in the following media are "live" and what percent "recorded", according to the current ASCAP survey?
- a. Radio network.
  - b. Local radio.
  - c. TV network.
  - d. TV local.

with respect to the above interrogatories, it is not necessary to mention any publisher by name.

The Department, in the light of the recommendations of the House Judiciary Committee, and in the spirit of equity [fol. 199] and fair play, has requested the court to allow all parties affected by the proposed decree to apply to be heard with respect to its provisions. We are sure, therefore, that the Department will be only too glad to answer the above questions so as to enable parties requesting leave to be heard to present an informed opinion.

Your prompt answers to the above questions will be appreciated by all members of the Society.

Sincerely yours,

SAM FOX PUBLISHING COMPANY, Inc.

By:

Herbert Cheyette

[fol. 200]

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

—against—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS  
AND PUBLISHERS, et al.,

Defendant.

STATE OF NEW YORK  
COUNTY OF NEW YORK, ss.:

HERBERT CHEYETTE, being duly sworn, deposes and says:

That he is the attorney for Sam Fox Publishing Company, Incorporated. That on the 25th day of August, 1959 he served the within AFFIDAVIT AND NOTICE OF MOTION upon William D. Kilgore Jr., Esq., the attorney for the above named plaintiff by depositing a true copy of the same securely enclosed in a post-paid wrapper in a Post Office Box regularly maintained by the United States Government at 11 Park Place, in the County of New York, directed to said attorney for the plaintiff at the Antitrust Division, Department of Justice, Washington, D.C., that being the address designated by him for that purpose, or the place where he then kept an office, between which places there then was and now is a regular communication by mail.

/s/ HERBERT CHEYETTE

Sworn to before me this  
25th day of August, 1959.

/s/ MINNA WITKOFF

MINNA WITKOFF, Notary Public  
State of New York, No. 03-4316000

Qualified in Bronx County

Commission Expires March 30, 1961

[fol. 201]

ENDORSEMENTS

The information sought having been given to applicant, voluntarily, this motion is withdrawn, without any determination by the Court of the applicant's status to make any application, herein so ordered.

Sept. 8, 1959.

/s/ SYLVESTER J. RYAN  
U.S.D.J.

(Stamp)

COPY RECEIVED  
U. S. ATTORNEY S. D. N. Y.

AUG 27 1959

By /s/ RICHARD B. O'DONNELL  
/s/ JBH  
Attorney

Dept. of Justice Anti-Trust Div.

(Stamp)

COPY RECEIVED  
AUG 27 1959  
SULLIVAN & CROMWELL  
Attorneys for ASCAP

SEP 1 1959

Motion respectfully referred to Chief Judge Ryan at the request of Counsel.

/s/ E. J. DIMOCK  
U.S.D.J.

Sept 2—

Adj. at request of Government to Sept. 8th, 1959 at 2:30 p.m.

/s/ SYLVESTER J. RYAN  
U.S.D.J.

[fol. 202]

[File endorsement omitted]

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

MEMORANDUM IN SUPPORT OF PROPOSED CONSENT FURTHER  
AMENDED FINAL JUDGMENT AND ENDORSEMENT THEREON—  
Filed September 2, 1959

A Final Judgment was entered in this case on March 4, 1941 and an Amended Final Judgment was entered on March 14, 1950. In 1956, as a result of complaints received from various members, the Government instituted an investigation of the internal operations of the defendant (hereinafter referred to as ASCAP) under the 1950 Judgment. That investigation disclosed that in at least six aspects the Judgment required more specific directives by the Court if the antitrust purpose of the Government's suit were to be achieved. ASCAP was given the opportunity to negotiate a proposed further amendment of the 1950 Judgment covering those areas which the Government deemed required correction. As a result of these negotiations a proposed further amended Final Judgment (herein referred to as the proposed Order) has been agreed to by the parties, and submitted to the Court for approval.

The purpose of this memorandum is to explain the six aspects of ASCAP's operations which are affected by the proposed Order and to explain the way in which that Order deals with each of those operations so as to carry out the antitrust purpose of this suit. These six aspects discussed in this memorandum involve:

- I. The right of ASCAP members to withdraw from ASCAP;
- II. The requirement that ASCAP scientifically conduct a survey of the performances of the compositions of its members as a basis upon which to make distribution of its revenues to its members;
- III. The manner in which ASCAP shall make distribution of such revenues to its members;

[fol. 203] IV. The limitation on the extent to which ASCAP may weight the votes of its members;

V. The manner in which ASCAP shall assure its members of equal treatment and an adequate opportunity to protect their rights within ASCAP; and

VI. The obligation upon ASCAP to admit all duly qualified applicants to membership.

I. The Right of ASCAP Members to Withdraw  
From ASCAP

(Cf. Section I of Proposed Order)

**Existing Practice**

The Government's investigation has disclosed that ASCAP's present rules make it economically unfeasible for a member to enjoy the right assured him under the 1950 Judgment to withdraw from the Society. These rules provide that as to revenue from existing licenses, a former member who has resigned shall not receive an credit for the performances of his songs, which are licensed by ASCAP, insofar as half of the amount apportioned to writer distribution is concerned and insofar as 45 per cent of the amount apportioned to publisher distribution is concerned. As to future licenses, the resigning member receives nothing even though ASCAP will continue to license his songs if his co-writer or publisher is a member of ASCAP. By thus depriving a member who withdraws from ASCAP of much of the value of his existing catalogue, ASCAP effectively denies him his right to withdraw. Thus ASCAP is restraining the potential competition which a resigned member could offer by licensing his future works through another licensing organization. Since ASCAP usually continues to license the ex-member's catalogue by virtue of the continued membership of the publisher or of a co-writer, the ex-member should receive from ASCAP the same distribution for such songs as does a member.

**Proposed Order**

Section I of the proposed Order meets this problem by permitting a resigning member to leave his works in the



ASCAP repertory and to be paid for performances if ASCAP continues to license them by reason of the membership of a co-writer or publisher of the composition. This is [fol. 204] also intended to avoid legal uncertainties which make doubtful the right of a resigning member to license his works so long as an author, co-author, or publisher of the works continues as an ASCAP member. Thus Section I requires full payment under the ASCAP rules to the resigning member for his works remaining in the ASCAP repertory while permitting him to license his future works to another licensing organization.

## II. The Requirement That ASCAP Scientifically Conduct a Survey of the Performances of the Compositions of Its Members as a Basis Upon Which to Make Distribution to Its Members.

(Cf. Section II(A), (B) and (C) of Proposed Order)

### Existing Practice

Our investigation discloses that ASCAP does not conduct "objective surveys" as a basis upon which to make distribution of its revenues to its members. The Government believes Section XI of the 1950 Judgment contemplates a survey which is at least adequate to give a representative sampling of the performances of the works of ASCAP's members. We conclude that the ASCAP survey has not reached that goal. Surveying by the use of the sampling technique has universally recognized basic principles. The ASCAP survey does not employ the most elementary of these principles—"randomness".

ASCAP's survey puts a premium on network broadcasting performances. It does not adequately take into account thousands of performances occurring daily over local radio and television stations or performances occurring in other media. ASCAP logs each commercial "network" performance and multiplies it by the number of affiliated stations carrying the program. In contrast, ASCAP in its so-called "local survey," logs less than one-fourth of one percent of the total hours of local broadcasting throughout the country. Yet every local radio performance of an ASCAP song

receives a multiplier of only 20, and every local television performance a multiplier of only 60.

The license fees received from radio and television net- [fol. 205] works account for only one-fourth of ASCAP's domestic revenue, but ASCAP distributes almost two-thirds of its income on the basis of network performances. Again in contrast, ASCAP distributes only one-third of its revenue on the basis of local radio and television performances although three-fifths of the Society's domestic income is derived from such sources. Further, 1.26 per cent of ASCAP's domestic revenue is received from other media, such as bars, grills, taverns, restaurants, night clubs, skating rinks, etc., but no distribution whatsoever is made on the basis of performance occurring in such media.

In addition, ASCAP's local survey is inaccurate and inefficient. This survey samples each day by the use of tape recorders, 32 radio stations and 22 television stations for a three-hour period per station. ASCAP samples from the same 22 metropolitan areas each day and additionally employs approximately 14 roving monitors who sample other areas. The tapes are then sent to the ASCAP office in New York where they are played by a group of employees having no special musical qualifications, who attempt to identify the songs and thus make a record of performances.

Moreover, this survey is not conducted in such a way as to include anything like a "representative" sample of the performances occurring on non-network programs and other media such as wired music, hotels, night clubs and the like. Thus the survey samples no more than one song out of every 500 performed throughout the country on local radio and television stations, but ASCAP applies a multiplier of only 20 to each song thus sampled.<sup>1</sup>

<sup>1</sup> Perhaps relevant here is a comparison made by the plaintiff of surveys of ASCAP and Broadcast Music, Inc. (hereinafter referred to as BMI) for the months of July, August and September of 1956. The comparison indicates (1) that ASCAP's survey only covered approximately .21 per cent of the total hours of local broadcasting during the three-month period, and that BMI's survey covered approximately 2.63 per cent; (2) that ASCAP's survey caught performances of approximately 25,000 different song titles, whereas BMI's survey caught performances of approximately

[fol. 206]

## Proposed Order

To meet this problem the Department of Justice, was initially presented with a proposed survey plan developed by an organization, Joel Dean Associates. This plan was at our request reviewed by personnel of the Bureau of the Census, recognized experts in the field of scientific surveying. Section II (A) and (B) of the proposed Order, as well as the final plan formulated by Joel Dean Associates, takes into account the views of the representatives of the Bureau of the Census. As a result the proposed Order requires ASCAP to conduct a census or scientific sample in accord with generally accepted principles of sampling.

The plan as finally formulated provides: (1) the samples must be randomly selected and proper blow-up multipliers must be employed to correctly reflect the estimated number of performances, and (2) ASCAP must use economic multipliers to reflect the dollar revenue to ASCAP from various groups of licenses surveyed. Within certain limitations and where feasible, a complete survey of all performances over a particular medium will be made. Thus ASCAP will continue its complete survey of performances on the major radio and television network commercial programs, but such performances will be subject to economic multipliers to reflect the dollar revenue to ASCAP attributable to the performances on this medium. Radio network sustaining programs, not being subject to complete survey as to the number of affiliated stations carrying each such program, will be logged with and treated as locally originated pro-

---

100,000 different song titles; that BMI's survey caught performances of approximately 20,982 different BMI song titles, whereas ASCAP's survey caught performances of only 5,026 non-ASCAP song titles. The ASCAP survey failed, then, to catch performances of more than 15,000 BMI songs, i.e., more than half of all the song titles caught on the ASCAP survey. The conclusion seems reasonable, therefore, that it likewise failed to catch performances of many ASCAP songs.

The plaintiff does not contend that the BMI survey is the only, or even the best, way to conduct a survey of performances. The plaintiff does not even suggest that the BMI survey is a correct survey. But the comparison of the two surveys does indicate clearly that ASCAP's present survey is woefully inadequate.

[fol. 207] grams.<sup>2</sup> The plan which has been developed by Joel Dean Associates, is expected to be put into operation about January 1, 1960. This survey plan calls for a 50 per cent increase in the size of the local radio samples. More importantly, however, it makes provision for scientific random selection of the stations to be sampled, and insures good geographical distribution of those stations. Provisions have been inserted in the Order designed to increase the accuracy of performance identification and, in addition, an experimental survey of performances in night clubs, dance halls and on wired music systems will be instituted. Extensive high speed electronic computing equipment is being installed by ASCAP to handle the complex calculations which are inherent in the operation of the system.

In response to the advice of the experts from the Bureau of the Census, the Government insisted upon, and ASCAP agreed, that Section II (B) of the proposed Order provide that after eighteen months plaintiff may seek additional relief in respect to the survey, including the scope, size or accuracy of the survey. Those experts advised that the adequateness of any survey plan, even though couched in technically accurate terms, depends upon how the plan is actually placed into operation, and how data produced from the survey is used to test the scope, size and accuracy of the survey. Accordingly, it was agreed that Section II (C) as well as II (B) be in the Order. Thus, under the proposed Order the Court, and the plaintiff and ASCAP as well, will [fol. 208] have the benefit of an independent expert to ad-

---

<sup>2</sup> This will meet a particular problem raised pertaining to ASCAP's survey when, in 1956, two ASCAP publisher members, Gem Music Publishing Corporation and Denton and Haskins Music Publishing Corporation, attempted to intervene in this action, charging that the Society's arbitrary reduction of credits for performances on radio network sustaining programs from 44 credits to writer members and 22 credits to publisher members to 3 credits was a violation of Section XI of the 1950 Judgment. In opposing this attempt to intervene, the plaintiff assured the Court that it was looking into the situation and committed itself, if it discovered that the Judgment was not being complied with, to report that conclusion to the Court and see that ASCAP adhered to the Judgment.

vise as to how the skeleton plan is fleshed out and operated. The Department has been assured that it will continue to have the informal advice of the Bureau of the Census as to any questions which may arise in the period when the survey plan is being placed in operation and being tested according to recognized procedures.

The ASCAP survey under the proposed Order will treat radio network sustaining programs on the same basis as local commercial programs. They will be logged in the local sample, not from the network, and will be given the same blow-up and economic multipliers as are local commercial programs. It is felt that this method gives as accurate an estimate as is obtainable of the number of local stations carrying such programs and the economic value of those stations to ASCAP.

Because of their importance to the cultural life of the nation and because of ASCAP's assurance that the membership by and large feels that such works are entitled to preferred treatment, special treatment is authorized for radio network sustaining programs carrying symphonic, concert and chamber music performances (see subsection (E) of attachment C of the proposed Order).

### III. The Manner in Which ASCAP Shall Make Distribution of Its Revenues to Its Members. (Cf. Section III of Proposed Order)

Since ASCAP's members are competitors and the Society's manner of making distribution of its revenues to them vitally affects their ability to compete with each other, a description of the situation which the proposed Order seeks to change is desirable. A rather full description of the Society's existing practice is also desirable inasmuch as some of the alternative methods of distribution permitted by the proposed Order find their roots in the historical development of the Society's existing practice.

Distribution to Writers and distribution to Publishers is [fol. 209] considered separately for, after deducting expenses, half of the revenue of ASCAP is distributed among the publisher members and half is distributed among the authors and composers.



### Existing Practice

Our investigation disclosed that prior to the entry of the 1950 Judgment, ASCAP's distribution was made on the basis of a subjective evaluation of the worth of the catalogue of each member in the opinion of the Society's Classification Committees as follows:

Distribution to authors and composers was on the basis of the value of the member's contribution to the Society's repertory in the opinion of the Writer's Classification Committee. For this purpose, all members were classified into nineteen classes, six of which were "fixed classes," and thirteen of which were "fluctuating classes." The "fixed classes" received stipulated amounts each year regardless of the Society's income, whereas the income of the "fluctuating classes" varied depending on the Society's income.

Distribution to publisher members was made solely upon a subjective basis until approximately 1936. Thereafter distribution was made in part on the basis of performances of the members' songs as shown by the logs of the four national radio broadcasting companies on the following basis: (1) 55 per cent of the publishers' share of ASCAP's revenue was distributed on the basis of current performances as shown by the logs of the network; (2) 30 per cent of the publishers' share was distributed on the basis of "availability," i.e., the evaluation of the worth of each publisher member's catalogue in the opinion of the Publisher's Classification Committee; (3) 15 per cent was distributed on the basis of "seniority," i.e., the average number of performances for the preceding five years multiplied by the number of quarters of the publisher's ASCAP membership.

[fol. 210] (A) Writer Distribution  
(Cf. Section III (A) and (B) of Proposed Order)

After the entry of the 1950 Judgment, ASCAP provided that distribution should be on the following basis:

- (A) 20 per cent for current performance;
- (B) 60 per cent for sustained performance;
- (C) 20 per cent for accumulated earnings.



(A) The 20 per cent distribution to authors and composers on the basis of "current performance" followed the method used by the publishers for their distribution on the basis of current performance.

(B) The 60 percent distribution for so-called "sustained performance", in effect carried over the prejudgment subjective system of classification as follows: Each of the prejudgment alphabetical classes was assigned a number corresponding with the alphabetical designations, with the AA class being given the number 1,000, etc. The average number of "performance credits" for the years 1945 through 1949 for the members of each class was calculated in order to give the "class average." This computation disclosed that the five-year average of the members' actual "performance credits" bore but little relation to their subjective classifications. ASCAP thereupon established the rule for the 1950 distribution that when a member's "performance credits" in 1950 were such as to bring his five-year average below this "class average," he could be demoted, but only to a very limited extent (regardless of how low his average had dropped), and conversely, if his "performance credits" were such as to raise his average above his "class average" he could be promoted but only to a very limited extent regardless of how high his average had increased. Since each writer's original rating was based on the "subjective" rating given to him prior to the entry of the 1950 Judgment, it is apparent that the system adopted in 1950 did little but perpetuate the original ratings, which the Government believes is contrary to Section XI of the 1950 Judgment.

In 1952 the Writers' Classification Committee divided the [fol. 211] so-called "sustained performance fund" into two funds (each fund being used for the distribution of 30 per cent of the writers' share of ASCAP revenue), one of which continued to be known as the "sustained performance fund" and the other of which was designated the "availability fund."

(1) Distribution of the "sustained performance fund" since 1952 has been based on the members' 1952 classification in the fund as modified by their later record of performance credits subject to "brakes" imposed on promotions

and demotions in the fund. Limited promotions and demotions have been permitted based upon the use of three concepts: "individual average," "actual class average" and "adjusted class average." A member's "individual average" is the average of his "performance credits" for the preceding five years or, at his option, ten years. The "actual class average" is the actual average of the "individual averages" of the members within any class. The "adjusted class average" is the hypothetical number of performances of each member in each class based on the assumption that each member is in his proper class on the basis of his performance credits (while the facts were not in accord with this basic assumption, the "adjusted class average" was a useful concept in showing the performance credits needed per classification point).<sup>3</sup>

A members' promotion or demotion in the "sustained performance fund" was based on the use of the above three [fol. 212] concepts as follows: It was provided that a member should be promoted only if his "individual average" was higher than either the "actual class average" or the "adjusted class average" of the class *above* him, and the extent of promotion was limited—if a member's current classification was above 500 he could rise a maximum of 250 points per year; if his current classification was below 500 he could rise no more than 125 points per year, plus one-half of the number of points to which he would other-

---

<sup>3</sup> To calculate the "adjusted class average," ASCAP first calculated the total number of so-called "classification points," as follows: The classifications, as heretofore noted, ranged from 1 to 1,000 and each member was assigned the number of "classification points" corresponding to his classification. For example, if there were four members in the 100-point classification, this gave a total of 400 "classification points"; three members in the 50-point classification gave a total of 150 "classification points," etc. After totalling the "classification points" of all members, the "individual averages" of performance credits of all members were then tallied. Dividing the total number of "classification points" into the total number of "performance credits" gave the number of performance credits needed per classification point. In 1957 this gave a figure of 41, so that to be in class 100 it was theoretically necessary to have an "individual average" of 4100 performance credits.

wise be entitled, but in any event not to exceed 250 points in any one year.

To be demoted, it was provided that a writer must meet both of the following requirements: His "individual average" must fall below both the "adjusted" and the "actual" averages of the class *below* him. He would, however, not be demoted if his "individual average" was above the "actual average" of his class and also above the lowest "individual average" of any member of the class above him, excluding those members who had fallen the maximum amount. His fall was further limited as follows: If his classification was above 500, he could not fall more than 100 points per year; if his classification was between 500 and 250, he could not fall more than 50 points per year; if it was between 250 and 100, he could not fall more than 25 points per year; if it was between 100 and 50, he could not fall more than 10 points per year; if it was under 50, he could not fall more than 5 points per year. Under these rules it would require 31 years for a writer's classification (insofar as distribution in this fund is concerned) to fall from 1,000 to zero, falling at the maximum rate.

The above rules governing distribution of the "sustained performance fund" permitted frequent situations in which a member's "individual average" would entitle him to a much higher or lower classification, but because of the limitations on promotions and demotions he could not be promoted or demoted. Demotions were very greatly retarded by these rules. Members in high classification, but having low "individual averages," have received large payments from the fund at the expense of members having lower classifications, but, in many cases, a great many more performances. In short, the above rules, in our opinion, have had the effect of prolonging the pre-judgment subjective method of distribution contrary to Section XI of the 1950 Judgment.

(2) The "availability fund" was established by the Society to "freeze" the distribution of 30 per cent of the writers' share of ASCAP's revenue in accordance with the pre-judgment "subjective" system of distribution, also, in our opinion, contrary to Section XI of the 1950 Judgment.

To this end, it was provided that each member's classification, for purposes of his participation in the "availability fund", was to be the same as his classification in the "sustained performance fund" as of July 1952 and, regardless of how poor his record of performances thereafter, no member could be demoted until July, 1956; after 1956 demotions are possible only once in every five years, and the fall is limited so that a member with a classification above 750 cannot drop below 750. Similar floors were established at 500, 375, 250, 175, 125, 75 and 50. Under this provision, a writer with a classification of 775, for example, would require 45 years, falling at the maximum rate, to drop to zero.

Promotions in "availability" rating are possible but difficult. The promotion must first be earned in the "sustained performance" rating and the full promotion is not given to the "availability" rating unless it is sustained for a three-year period. Only 40 per cent of any increase in "sustained performance" classification is given to the author's "availability rating" the first year. If the increase is maintained for a second year, 30 per cent of the increase is added to the "availability" classification; and only if the increase is maintained for a third year is the final 30 per cent added to the "availability" rating.

(C) The writers' "accumulated earnings fund" distributed [fol. 214] uses 20 per cent of the writers' share of ASCAP's revenue. This distribution is made by taking the five-year average of the writer's point rating in the "sustained performance" and "availability" funds and multiplying it by the number of quarters of the writer's membership in ASCAP. The totals for all members are added together and divided into the fund to be distributed in order to calculate the dollar value of one point in this fund. A member with 40 years of membership will receive four times as much from this fund as a member with only ten years of ASCAP membership, although each has the same sustained performance and availability ratings over the past five years. In practice, it is impossible for a writer with only ten years' membership to have a high five-year average of "availability" and "sustained performance" ratings because of the limitations on promotion in those funds.

Because of the use of the "sustained performance" and "availability" funds, distribution for 1958 from the "accumulated earnings fund" may be partially based on performance credits going as far back as 1942. The fund is objectionable, in this suit, for the further reason that instead of basing distribution primarily on performances it provides for distribution based primarily on length of membership and membership, prior to the entry of the Judgment, was granted or withheld at the absolute discretion of the Board of Directors.

### Proposed Order

Section III (A) of the proposed Order seeks to meet our objections to ASCAP's present method of making distribution to its writer members by establishing two alternative systems under which writers may elect to receive distribution.

Under one alternative a writer may elect to receive distribution solely upon the basis of his current performance credits as shown by the performances recorded during the preceding fiscal survey year beginning with the fiscal survey year starting January 1, 1960. He may exercise the option to receive payment in this manner at the beginning [fol. 215] of any fiscal survey year. The first time he exercises the option it will be binding for two years. Should he thereafter, however, elect to receive distribution according to the second alternative (set forth below), and within five years thereafter wish to again change to the current performance option, his election will be binding for a period of five years.

Under the other alternative, a writer may elect to receive distribution according to a plan which revises ASCAP's present system of distribution. Twenty per cent of the amount distributed to writers electing this plan will be distributed on the basis of current performances. Thirty per cent of the money distributed to the writers electing this plan will be distributed on the basis of a five year average of their performance credits. Thirty per cent will be distributed on the basis of a five-year average of their performances of "recognized works". "Recognized works" are



those compositions which have received performance credits in the ASCAP survey at least four quarters prior to the performance in question. The remaining 20 per cent will be distributed on the basis of the writer's length of membership in ASCAP or so-called membership continuity, with the proviso that no writer will be credited with more than 42 years' membership. The sharp brakes which exist on promotion and demotion in somewhat similar funds now employed by ASCAP will no longer be permitted. ASCAP may limit for one year the rise in a member's rating in the "average performance" and "recognized works" funds and it may limit the fall in his rating in these funds for no more than two years.

In addition to the defects heretofore mentioned, ASCAP's present system of writer distribution compels the top writer members, commonly referred to by the Society as the "superdreadnaughts", to share a large part of their earnings with their less successful competitors. This has been accomplished by enacting separate rules in regard to them. [fol. 216] These rules require these writers to have more performances per classification point, and more performances than their competitors in lower classifications, in order to earn a comparable increase in rating in the funds.

Section III (B) of the proposed Order continues to permit ASCAP to treat the top writers differently than other members, but on the condition that such writers are given the opportunity to freely vote their approval or disapproval of such treatment. This exception was made at the request of ASCAP and upon the representation by ASCAP that these writers with a large number of performances would voluntarily forego a substantial portion of the money otherwise due them in order to increase the amount available for distribution to less successful members.\* Under Section III

---

\* If the 100 members with the highest five year averages vote to approve a rule withholding the current performance option from themselves, they will thereby be giving up an estimated \$2,000,000 per year, and that money to which they would otherwise be entitled will be distributed under this plan. Those members selecting payment on a strictly current performance basis will not share in the amount which these top writers propose to give up.



(B) the 100 top writers (in terms of their five year averages of performance credits) acting as a group may, by a majority vote, counted on both a per capita and performance basis, approve a rule by ASCAP denying them the option to receive payment on a per performance basis.

The Government, in order to have some safeguard as to the will of these top 100 writers with respect to this rule, insisted upon and ASCAP agreed, that the terms of Section III (B) require that at any time after three years from the entry of the Order, upon the request of (1) the Government; (2) 25% of the affected writer members; or (3) writer members having 25% of the performance credits in the latest available five preceding fiscal survey years out of the total [fol. 217] number of such credits of all the affected members, a new vote shall be had to determine whether the rule should continue in effect.

#### (B) Publisher Distribution

(Cf. Section III (C) and (D) of Proposed Order)

##### Existing Practice

After 1950, ASCAP continued to distribute 55 per cent of the publisher's share of ASCAP's revenue on the basis of "current performances". The 30 per cent distribution for "availability" was put on an objective basis as follows: The average number of performances of each publisher's catalogue for the preceding five years was computed to give a numerical basis for the publisher's "availability" rating. However, in contrast to the terms of Section XI of the 1950 Judgment, it is significant to note that in making this computation it was provided that no performances of a song would be considered unless and until the song had achieved a record of performances covering at least a two year period. This proviso has had the effect of continually eliminating for at least a two year period the competition of new songs insofar as 30 per cent of the publisher's distribution is concerned. It has also unfairly enhanced the amount received each year for the performance of songs which have achieved a record of performances covering a two year period. The difficulty with this situation is two-fold: (a) it benefits certain members at the expense of their less fortunate

nate competitors and (b) it excludes new songs from consideration in the distribution from this fund. Since a new publisher must rely upon new songs, the rule particularly places him at a competitive disadvantage.

The remaining 15 per cent distribution for "seniority" was not changed and the effect of this provision has been to give the older established publisher members a larger payment per performance of each song at the expense of the publishers who have had a shorter period of membership in the Society, putting them at a competitive disadvantage.

[fol. 218]

### Proposed Order

Section III (C) and (D) of the proposed Order attempts to meet the Government's objections to ASCAP's present method of making distribution to its publisher members by establishing two alternative systems under which publishers may elect to receive distribution. Under one alternative, a publisher may elect to receive distribution solely on the basis of his current performance credits as shown by the performances recorded during the preceding fiscal survey year beginning with the fiscal survey year starting January 1, 1960. However, to prevent inequities a change-over period is permitted as follows: For performances recorded during the fiscal survey year commencing January 1960, publishers electing this option will receive but 75 per cent of the distribution to which they would be entitled if all publisher distribution during the same period were on a current performance basis.<sup>3</sup> This percentage will increase 5 per cent per year until in 1965 publishers choosing this system of distribution will receive 100 per cent of the distribution to which they would be entitled if all publisher distribution were on a current performance basis. A publisher may exercise the option to go on a current performance basis at the beginning of any survey year, but, once exercised, the option may not be revoked.

Under the second alternative, a publisher may elect to receive distribution according to a system somewhat simi-

<sup>3</sup> It is recognized that initially perhaps only those publishers relying primarily on current hits will find this option attractive.

lar to that now used by ASCAP. Under this system, 55 per cent of the publishers' share of the ASCAP income (after deducting the distribution made to the publishers electing the current performance option) will be distributed on the basis of current performances as shown by the latest fiscal survey year commencing with the survey year [fol. 219] starting January 1, 1960. This will gradually increase until in 1965 70 per cent will be so distributed. Thirty per cent will be distributed to the members selecting this system on the basis of performances of "recognized works" during the preceding fiscal survey year.\* Fifteen per cent will be distributed on the basis of a publisher's seniority, i.e., number of quarters of membership multiplied by his current performance credits. The percentage so distributed will gradually decrease until in 1965 the seniority distribution will end altogether.

In summary, the over-all effect of ASCAP's existing distribution system is that more than 80 per cent of all monies distributed to author and composer members, and more than 45 per cent of all monies distributed to publisher members, are now distributed on a basis which does not give primary consideration to performances as contemplated by Section XI of the 1950 Judgment. The system further perpetuates the Society's pre-judgment subjective system of classification. Instead of making distribution to its members on a basis which gives primary consideration to performances, under ASCAP's present system some writers initially receive as little as 13 cents per performance and others as much as \$25 per performance.

The proposed Order, in contrast, establishes a system under which all writer and publisher members can, before January 1960, elect to receive payment on a per performance basis. The proposed Order, however, provides for alternative methods of payment for those members who do not wish to risk the vicissitudes inherent in per performance distribution. Thus, we seek to assure the maximum feasible area of individual choice.

---

\* "Recognized works" are compositions which have received performance credits in the ASCAP survey at least four quarters prior to the performance in question.

(C) ASCAP's Distribution of Foreign Revenue  
(Cf. Section III (E) of Proposed Order)

[fol. 220]

Existing Practice

ASCAP has followed what the Government believes is an unfair method of distribution of revenue received from affiliated foreign performance rights societies. ASCAP receives about \$2,000,000 per year from foreign societies for the foreign performing rights on ASCAP licensed compositions. Although the compositions of some of its members have large performances predominantly in foreign countries such as Germany and Austria, ASCAP distributes all foreign royalties solely on the basis of performance reports of English, Swedish and Canadian societies. Under ASCAP's system of distribution of foreign royalties, publisher members whose works are not performed in England, Sweden or Canada receive no payments from ASCAP for other foreign performances despite the fact that their works may have been performed extensively in other foreign countries and ASCAP may have received payments from such other foreign countries based on the performance of such works.

Proposed Order

Section III (E) of the proposed Order attempts to meet this problem, while at the same time taking into consideration the administrative problems involved, by directing ASCAP to make distribution of foreign royalties on the basis of reports from the country from which the royalties came if these royalties exceed \$200,000 per year and if the reports are readily usable by ASCAP.

(D) ASCAP's Weighting Rules  
(Cf. Section III (F) of Proposed Order)

Existing Practice

In its distribution to both writers and publishers, ASCAP has followed the practice of awarding partial credits for performance of certain songs when used as themes, jingles, cues and background as opposed to so-called feature per-

formances. The respective Publisher and Writer Classification Committees have the authority to establish and modify [fol. 221] these rules at their discretion without approval or ratification by the members. The rules are frequently applied so as not to give primary consideration to performances. Under ASCAP's existing rules governing the award of credit for performances of songs used as themes, background uses and jingles, the credit awarded per performance is in general based on the song's total record of performance credits in the Society's survey and the distinction between the amount of credits awarded to songs used for similar purposes may be as great as 1,000 to one. During 1957, 19.69 per cent of all ASCAP performance credits were awarded for background uses, 9.61 per cent for use as theme songs and 1.90 per cent for use as jingles—over \$6,000,000 per year is distributed for performances of theme songs and background music. Thus the extreme importance of these rules in the competitive struggle among ASCAP members cannot be over-emphasized.

Such rules put certain members of the Society at a tremendous competitive disadvantage. ASCAP has supplied a list of twelve compositions which have together earned a total of more than 650,000 performance credits as background music and theme songs during the single year 1958. These twelve songs earned more credit than did the entire catalogue of Irving Berlin or Oscar Hammerstein.<sup>†</sup> Only one of these songs had more than 40 feature performance credits, and together they had only 814 feature performance credits. While the amount of credits to be awarded for various kinds of performances may properly be a matter for the business judgment of the ASCAP Board of Directors, the Government took the position that it is not consonant with the antitrust purpose of this suit as embodied [fol. 222] in Section XI of the 1950 Judgment, to allow discrimination of as much as 1,000 to one among songs simi-

<sup>†</sup> The songs are: Simple Melody, American Beauty March, Concert for Toy Piano, I Never Heard You Say, Let's Go Together, Listen to the Green, Open the Day With a Smile, Little Darling, Little White House, Breakfast Club Makes Life, etc., Good Morning Breakfast Clubbers, and So Long You Breakfast Clubbers.



larly used but awarded different credit for such performances.

### Proposed Order

Section III (F) and "Attachment C" of the proposed Order attempt to meet this problem by giving ASCAP the right to continue to make distinctions among compositions similarly used as background music and theme songs, but requiring that the distinction be based on objective records of feature performances indicative of the song's current value to the ASCAP repertory and putting a strict limitation on the extent of the discrimination. For use as a theme song these distinctions may not exceed a ratio of 10 to one and for use as background music they may not exceed a ratio of five to one, between songs receiving full credit on the one hand and on the other hand those which have merely been commercially published, commercially recorded and logged five times in the local radio survey of ASCAP performances. These qualifications of publication, recording and a minimum number of performances are designed to distinguish between songs written for general use and currently being performed as feature works and those written expressly as background for specific dramatic shows. This latter type of composition is treated on a durational basis and awarded no less than 5 per cent credit for each 45 seconds of performance time.

An important innovation is the rule that all distinctions must be based on the song's record of "feature performances" as contrasted with the present system in which performances as background music or as a theme may help a song build up required credit to earn higher payments. To qualify for full credit a song in the future will have to have a record of 20,000 feature performance credits plus a record of 2,500 feature performance credits during the preceding [fol. 223] five years. No more than 750 credits can be earned towards this 2,500 figure in any one year. The purpose of these rules is to provide a stringent but fair test under which only truly outstanding songs can obtain full credit when used as background music or as theme songs, while at the same time preventing undue discrimination against competitive songs used for a similar purpose.



(F) ASCAP's Distribution of Revenues From Arrangements of Public Domain Compositions  
(Cf. Section III (G) of Proposed Order)

Existing Practice

ASCAP's present writer distribution system providing for distribution from the so-called "sustained performance fund" and "Availability fund" and putting stringent "brakes" upon the extent to which a member could be demoted in his rating or classification in such funds could be construed as permitting distribution to a member from those funds long after all of his copyrights had expired. ASCAP denies that any such distribution has in fact been made to a member after the expiration of a member's copyright.

Proposed Order

Section III (G) of the proposed Order sets the matter at rest by ordering that ASCAP shall grant no performance credits to any member for performances of any composition occurring after the composition is in the public domain. This does not, of course, prevent the Society from making proper distribution to holders of copyrighted arrangements of public domain works for the performance of such copyrighted arrangements.

IV. The Limitation on the Extent to Which ASCAP May Weight the Votes of Its Members  
(Cf. Section IV (A) through (F) of Proposed Order)

One of the antitrust objects of this suit, as expressed in Section XIII of the 1950 Judgment is to "insure a democratic administration of the affairs of ASCAP..." ASCAP [fol. 224] exists because no individual writer or publisher is large enough to be able to grant licenses to the thousands of commercial music users throughout the country and then enforce such licenses. ASCAP's fundamental purpose is to license the works of all of its members and to distribute to the members the revenue obtained thereby. The economic life of the members of ASCAP is dependent on ASCAP's performance of these two duties. Since ASCAP's members are in competition with each other, it was one of the anti-

trust purposes of this suit to make it impossible for certain members to use the Society to obtain an unfair advantage over their competitors.

### Existing Practice

ASCAP's present rules frustrate this express purpose in that they give complete control over all the affairs of the Society to its Board of Directors and, at the same time, give improper weight to the classification of its members in determining the number of votes each member may cast for the election of directors. While ASCAP's nominating committee nominates members with different participation in ASCAP's revenues, these men cannot truly represent the members having small participation in the Society's revenues since their election is dependent on the votes of those members having large participation in the Society's revenues. Members having large participation in ASCAP's revenues (less than 5 per cent of the writer members and less than one percent of the publisher members) have the power to elect all of the Society's directors. Those having smaller participation in the Society's revenues (more than 95 per cent of the writer members and more than 99 per cent of the publisher members) do not have the combined power to elect a single director.

ASCAP's Board of Directors, elected bi-annually, is composed of 12 publisher members and 12 writer members elected respectively by publisher member and writer members. The Board has complete control of the affairs of the [fol. 225] Society. It elects the officers; its members act as the writers and the publishers classification committees; it appoints all other committees; it is in large measure self-perpetuating for it elects the committee which has the power of nominating candidates for the Board of Directors.

ASCAP's Board of Directors, as hereinbefore stated, has established a distribution system which has the effect of favoring certain members at the expense of others, and, at the same time, ASCAP has "weighted" the votes of its members so as to provide that those members who receive the greatest share of its revenues shall also have the largest number of votes. The vice of the system is that it gives those members in ASCAP who receive the largest share of

ASCAP's revenues the power to elect the directors of the Society, who, in turn, have the power to establish the rules governing the Society's system of distribution, which, in turn, determines which members shall receive the largest share of the Society's income.

ASCAP has provided that each writer member shall have one vote for every \$20 of his ASCAP income, and each publisher member shall have one vote for each \$500 of its ASCAP income. This system gives more than 50 per cent of all writer votes to less than 5 per cent of the writers, and it gives over 50 per cent of all publisher votes to less than one per cent of the publisher members. The result of this is that less than one percent of the publishers have the voting power to elect all twelve of the publishing directors, and less than 5 per cent of the writer members have the voting power to elect all twelve of the writer directors. Under such circumstances, it is impossible that true representation can be given on the Board of Directors to members with different participation in the ASCAP revenues as contemplated by Section XIII of the Judgment. For example, it is not consonant with true representation for the three largest publishers to select those who shall represent their [fol. 226] more than one thousand small competitors. Although an amendment may be placed before the membership either by receiving the approval of the Board of Directors, or by a petition signed by 15 per cent of the membership, any relief in this respect must come, if at all, by way of an order of this Court for any attempt to amend the Articles of Association to eliminate the "weighted vote," as now in effect, would itself be subject to the "weighted vote."

#### Proposed Order

Section IV (A) through (F) of the proposed Order is designed to remedy this situation by (1) weighting votes on the basis of performance credits rather than on the basis of a member's ASCAP income; (2) limiting to one hundred votes the number of votes which each member may have; (3) setting up a graduated scale of performance credits needed per vote, so arranged that those members having large numbers of performance credits will need more credits per vote than will their less successful competitors; (4)

making possible minority representation by providing that if a nominating petition is signed by writer or publisher members having one-twelfth of the writer or publisher votes, as the case may be, the person named thereon will be automatically seated on the Board of Directors; (5) limiting the total percentage of votes which may be held by the top ten publishing firms, including all their affiliates; and (6) permitting any twenty-five writers or publishers to nominate candidates for the Board of Directors. This is in sharp contrast with the existing practice where the publisher member having the most votes in 1957 had 1,469 votes and the writer member having the most votes in that year had 5,116 votes.

V. The Manner in Which ASCAP Shall Assure Its Members of Equal Treatment and an Adequate Opportunity to Protect Their Rights Within ASCAP

(Cf. Section V (A) through (E) of Proposed Order)

A member's "classification" is in part a result of the number of performance credits awarded to him, which, in turn, is a result of ASCAP's logging practices and the number of credits awarded for any performance. One of the [fol. 227] antitrust purposes of the suit, as expressed in Section XIII of the 1950 Judgment, was "to assure [ASCAP's] members an opportunity to protect their rights through fair and impartial hearings based on adequate information". For this purpose it was provided "That any member may appeal from the final determination of his classification by any ASCAP committee or board to an impartial arbiter or panel." In the Government's view, ASCAP's grievance machinery does not carry out these objectives, thus additional specific directives are necessary.

### Existing Practice

As stated above, a member's "classification" is a direct result of ASCAP's rules of distribution. These rules are made for the publisher members by the publishers' classification committee and for the writer members by the writers' classification committee. The committees consist, respectively, of the twelve publisher members and the twelve writer members of the Board of Directors. Despite the fact that the ASCAP distribution constitutes the sole return

which its members get for their performing rights licensed by ASCAP, the members of ASCAP are not consulted about the rules of distribution. The members have nothing to say about the enactment or promulgation of the rules, nor is there any appeal from their enactment or promulgation. At the discretion of the committees, rules of distribution may be, and have been, enacted to apply retroactively. In addition, ASCAP, notwithstanding the requirements of Section XIII (B), at times has failed to publish rules which vitally affect the classification of its members, has failed to notify or advise its members concerning such rules, and has even refused to answer requests by its members concerning problems covered by such rules.

Appeals are possible only as to the interpretation and application of the rules. ASCAP has failed to provide machinery so that a "member may appeal directly from the [fol. 228] final determination of his classification by any ASCAP committee or board to an impartial arbiter or panel." Rather, ASCAP has provided that any appeal by a member from the final determination of his classification shall be to the classification committee which made that determination. The grievances which may be brought before the committees in general fall within two categories: (1) that ASCAP has failed to give credit for some performance and/or (2) that ASCAP has given inadequate or improper credit for some performance. The aggrieved member must first discover the improper application of the rules to himself. This is most difficult as ASCAP's statement of earnings, which is supplied to the members, does not designate the specific performances for which credit is awarded or the number of credits awarded specific performances of his song, and ASCAP has at times refused to make its records available to members. The committee requires the complainant to prove that performances have taken place, that they were on stations or networks being logged by ASCAP at the time of the performance, that ASCAP failed to log them or to award them proper credit. The burden of proof is at all times on the complainant.

If the decision of the classification committee is adverse to the aggrieved member, he still does not have an appeal to an "impartial arbiter or panel", as contemplated by Sec-



tion XIII (C). The next appeal is to a so-called Board of Appeals, which is composed of six members elected by the membership voting under the "weighted vote" from candidates nominated by a nominating committee which, in turn, was chosen by the Board of Directors. The same rules as to the burden of proof and the scope of the inquiry apply at this stage of the proceedings. Only after these lengthy and expensive proceedings does a complainant have a right of appeal to an "impartial Board of Appeals."

In addition, notwithstanding the terms of Section XIII (D), the classification committees and board of appeals have [fol. 229] consistently failed to adequately apprise the members of the bases of their decisions. An appeal is difficult because, as a rule, no stenographic reports are kept at any stage of the proceedings. Thus, it is apparent that ASCAP's appellate machinery has been made so complex, cumbersome, dilatory and expensive as to effectively deny its members the right of appeal to an impartial board.\*

Appeals involving the interpretation of ASCAP's complex rules of distribution or the application of the rules to a specific instance are generally ineffective. For example, where a complaining member succeeded in winning the appeal, the classification committee once rewrote the rule so as to modify the decision. Further, the adjustments normally are not retroactive. By the time the appeal has been successfully prosecuted, the song involved has usually lost its popularity, and any credit to be awarded for future performances is a *de minimis* matter. A few members have succeeded in getting retroactive adjustments where they have been fortunate enough to be able to enlist the assistance of certain persons in the Society.

### Proposed Order

Section V of the proposed Order seeks to prevent similar problems in the future by (1) clearly defining the scope of

---

\* A recent case was settled by ASCAP after it had gone through the first two stages of this appeals machinery. The settlement was designed to compensate the complainant for only his expenses and attorney's fees, and was for \$12,500. The case had required three years to proceed through the first two levels of internal appeal.



appeals; (2) eliminating one stage of the internal appellate machinery; (3) giving a member unlimited access to records of his own compositions and access to the records of the compositions of others when necessary; (4) providing for retroactive payments; (5) directing ASCAP to properly inform its members of all decisions of appellate bodies and of all new rules; and (6) providing transcripts at cost to members.

[fol. 230] Since, in order to effectively make use of the rights granted in Section IV (D) and (E) of the proposed Order, a member may find it desirable or necessary to have a mailing list of the Society's members, Section V (B) requires ASCAP to make such a list available at the written request of any member who has been a member for at least a year. In addition, ASCAP is required by Section V (A) of the proposed Order to supply each member with a copy of the Order and the attachments thereto, together with any rule or regulation hereinafter promulgated which in any way affects the member's voting rights or rights in the ASCAP distribution.

#### VI. The Obligation Upon ASCAP to Admit All Duly Qualified Applicants to Membership (Cf. Section VI (A) through (C) of proposed Order)

As heretofore stated, no individual writer or publisher is large enough to be able to grant and enforce licenses to the thousands of commercial music users throughout the country. The right to become a member of ASCAP may thus be indispensable for a writer, composer or publisher.

#### Existing Practice

The need for Section VI of the proposed Order is based on the fact that ASCAP has at times refused to admit applicants despite the fact that they clearly were qualified for admission to membership under the provisions of Section XV of the 1950 Judgment. In 1955, ASCAP refused to admit Mr. Bernard Young as a writer member, despite the fact that Young's songs had been "regularly published" by ASCAP publisher members and ASCAP itself was licensing the songs to users and collecting royalties therefor.

Not until the Government had filed an action in this Court to compel ASCAP to abide by the 1950 Judgment did ASCAP admit the applicant. In other instances, ASCAP has refused to admit applicants on the alleged ground that the ASCAP survey has shown no performances of the applicants' songs.

[fol. 231]

### Proposed Order

Section VI of the proposed Order meets this problem by providing that ASCAP shall grant membership retroactively to any qualified applicant previously denied membership. It further provides that ASCAP shall annually advertise in well-known trade papers the qualifications for membership. In the event an applicant is refused membership, the Society must state the grounds for turning down the applicant, and it may not refuse membership on the ground of lack of performances as shown by the ASCAP survey.

### Conclusion

Our investigation disclosed the existence of various practices in six aspects of ASCAP's internal operations which were operating to frustrate or prevent the achievement of the antitrust purpose of the Government's suit against ASCAP. The proposed Order is designed to remove or curtail these practices. It is the opinion of the Government that the proposed Order will accomplish, in the six aspects of ASCAP's operations with which it deals, the antitrust purpose of this suit.

Respectfully submitted,

Alfred Karsted, John L. Wilson, Attorneys for  
Plaintiff, Department of Justice.

Dated: September 2, 1959.

[fol. 232]

### ENDORSEMENT

The Clerk is directed to file the within brief with the papers in this suit, so that it may be available to all those interested. So ordered.

Sept. 2nd 1959.

Sylvester J. Ryan, U.S.D.J.

[fol. 233]

[File endorsement omitted]

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF ARNOLD SAEMANN AS TO MAILING DOCUMENTS—  
Filed October 9, 1959

State of New York,  
County of New York, ss.:

Arnold Saemann, being duly sworn, deposes and says:

I am over twenty-one years of age and am employed by the American Society of Composers, Authors and Publishers (hereinafter "ASCAP"). My duties include the supervision of mailing documents to the members of ASCAP.

Exhibit A hereto attached is a copy of a booklet containing copies of (1) a letter dated August 26, 1959, addressed to all members of ASCAP and signed by Mr. Stanley Adams, and (2) "Remarks Of Mr. Arthur H. Dean At The West Coast Meeting Of ASCAP on August 18, 1959."

On or about August 26, 1959, envelopes were addressed to all members of ASCAP by running them through the ASCAP addressograph. Thereafter one copy of Exhibit A, and no other documents or material, was inserted in each of such envelopes. On August 27, 1959, all the aforesaid envelopes, securely sealed and postpaid, first-class, were mailed at the Grand Central Branch of the New York Post Office.

[fol. 234] Exhibit B hereto attached is a copy of a booklet containing copies of (1) a letter dated September 4, 1959, addressed to all members of ASCAP and signed by Mr. Stanley Adams, and (2) "Remarks Of Mr. Arthur H. Dean At The New York Meeting Of ASCAP on August 27, 1959."

On or about September 3, 1959, envelopes were addressed to all members of ASCAP by running them through the ASCAP addressograph. Thereafter one copy of Exhibit B, and no other documents or material, was inserted in each

of such envelopes. On September 4, 1959, all the aforesaid envelopes, securely sealed and postpaid, first-class, were mailed at the Grand Central Branch of the New York Post Office.

Exhibit C hereto attached is a copy of a letter dated September 30, 1959, addressed to all members of ASCAP and signed by Mr. Stanley Adams.

On or about September 29, 1959, envelopes were addressed to all members of ASCAP by running them through the ASCAP addressograph. Thereafter one copy of Exhibit C, and no other documents or material, was inserted in each of such envelopes.

On September 30, 1959, all the aforesaid envelopes, securely sealed and postpaid, first-class, were mailed at the Grand Central Branch of the New York Post Office.

Exhibit D hereto attached is a booklet containing copies of (1) a letter dated October 5, 1959, addressed to all members of ASCAP and signed by Mr. Stanley Adams, and (2) a "Memorandum For The Information Of Members Of ASCAP, With Respect To The New Survey Put Into Effect On October 1, 1959."

[fol. 235] On or about October 5, 1959, envelopes were addressed to all members of ASCAP by running them through the ASCAP addressograph. Thereafter one copy of Exhibit D, and no other documents or material, was inserted in each envelope. On October 6, 1959, all the aforesaid envelopes, securely sealed and post-paid, first-class, were mailed at the Grand Central Branch of the New York Post Office.

Arnold Saemann

Sworn to before me this 8th day of October, 1959.

Henry Hofschuster, Notary Public, State of New York,  
No. 03-6934300, Qualified in Bronx County, Certificate filed  
in New York County, Commission Expires March 30, 1960.

(Seal)

[fol. 236]

## EXHIBIT "A" TO AFFIDAVIT

Murray Hill 8-8800 Cable Address: ASCAP, New York

AMERICAN SOCIETY OF COMPOSERS,  
AUTHORS AND PUBLISHERS575 Madison Avenue  
New York 22, New YorkSTANLEY ADAMS  
President

August 26, 1959

*To All Members of the Society:*

At the West Coast meeting, which was held on August 18, 1959, Mr. Arthur H. Dean, special counsel to the Society, addressed the meeting with respect to the proposed Consent Order which will be submitted to Chief Judge Ryan on October 19, 1959.

Because of the importance of the subject matter of Mr. Dean's remarks, a copy is being sent herewith to all of the members of the Society.

Sincerely yours,

STANLEY ADAMS, *President*

[fol. 236a]

REMARKS OF MR. ARTHUR H. DEAN AT THE  
WEST COAST MEETING OF ASCAP ON  
AUGUST 18, 1959

President Adams and ladies and gentlemen of ASCAP:

We are met to-day to discuss the proposed Court Order and the other documents previously sent to members with respect to certain proposed amendments to the existing anti-trust consent decree.

As artists contributing to the great cultural values of the nation, I salute you.

When I was retained by the Society last summer, it soon became apparent that we should explore with the Depart-

ment of Justice whether the questions raised by the Department could be resolved by agreement rather than by expensive litigation. This is always the duty of counsel.

A trial of these issues would have been very lengthy and expensive. Moreover, its outcome would have been difficult to predict because of the many serious anti-trust problems posed by the fact that ASCAP represents thousands of independent and competing writers and publishers.

Although the previous consent decrees entered under the anti-trust laws between the Government and ASCAP in 1941 and 1950 imposed many restrictions on the Society, they have also served, in a certain sense, as charters which spelled out the broad areas in which, as a practical matter, the Society could operate thereunder, under the watchful eye of the Court, without fear of allegations of violation of the anti-trust laws generally from the Department of Justice.

Let me be legal for just a moment and read to you from Section XVII of the 1950 Decree, which governs these Court proceedings:

"Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this Amended [fol. 236b] Final Judgment to make application to the Court for such further order and directions as may be necessary or appropriate in relation to the construction of or carrying out of this Judgment, for the modification thereof, for the enforcement of compliance therewith and for the punishment of violations thereof.

"It is expressly understood, in addition to the foregoing, that the plaintiff [the U. S. Government] may, upon reasonable notice, at any time after five years from the date of entry of this amended Final Judgment [March, 1950] apply to this Court for the vacation of such Judgment, or its modification in any respect, including the dissolution of ASCAP."

You will see that our task as your counsel was to try to convince the Department of Justice not to make such an application to the Court until we had had an opportunity to confer with them. Originally, the Department proposed



to file an application to the Court around Labor Day last year.

In our first discussions with the Department of Justice lawyers, they contended that the 1950 consent decree, or ASCAP under it, did not adequately safeguard competition among the members of the Society in the writing and publishing of songs.

They claimed, for example, that the 1950 decree, or ASCAP under it, did not properly allocate, among the members, the revenues of the Society and the votes in the Society.

The Board of Directors of ASCAP and the Society's attorneys took issue with many of the Department's contentions. Nevertheless, we hoped that a satisfactory agreement could be made with the Government without jeopardizing the fundamental values of ASCAP and its great cultural use to the nation, or the basic principles served by its practices and policies.

[fol. 236c] After almost a year filled with many conferences between the Department of Justice and ASCAP attorneys, as well as a very careful review of ASCAP's practices and policies by its own Board of Directors, its management and its counsel, a proposed Consent Order and certain related documents were filed on June 29, 1959, in the Federal District Court in New York City, and a hearing was set for October 19, 1959, before Chief Judge Ryan.

One reason why the negotiations with the Department of Justice were so time-consuming was the fact—which was not surprising—that the Department, with its manifold duties, was not familiar with all of the details of the very specialized problems of ASCAP. This was true both with respect to ASCAP's unique position in the entertainment field and with respect to the relations between ASCAP and its members.

Only through long discussions, which were directed for the most part at acquainting the Department lawyers with these problems, were your Society's attorneys able to find acceptable solutions to the issues raised by the Department. This was possible because, in the final analysis, the Department shared the common desire to frame a Consent Order that would be consistent with the success of the entire So-

ciety and in the best interests of the general membership and of the general public.

Copies of the proposed Consent Order and the proposed distribution formulae and weighting rules were sent to all of the members last month.

I then prepared a memorandum describing, I hope simply and concisely, how the Consent Order would affect the Society's members. A copy of that memorandum was also sent to all the members.

With your permission, I should now like to go through the proposed Order with you, attempting to explain the meaning of its lengthy provisions, the objections of the [fol. 236d] Department that gave rise to those provisions, and the ways in which those provisions will require changes in the Society's rules and practices.

In addition, I will attempt to describe the theories underlying certain of those provisions which, on first reading, may not be clear to some of you.

This is going to be long and perhaps tedious. But I know of no other way to do it.

I propose to take up the proposed Consent Order, page by page, which has the advantage of order but the disadvantage of not taking up the most important provisions first.

#### I. RESIGNING MEMBERS.

First let me take up resigning members. The first section of the Consent Order relates to the treatment of resigning members whose works continue to be licensed by ASCAP.

It is the present practice of the Society to make distributions to former publishers only out of the Current Performance Fund (55%) and to make distributions to former writers only out of the Current Performance Fund (20%) and the Sustained Performance Fund (30%), for performances of their works under licenses in effect at the time of their resignation. Technically, this rule applies only to monies received from radio and TV licensees, for the distributions of the much smaller revenues from other licensees such as hotels and restaurants are "phased out" within one year after resignation on the basis of 100%

"parity" for the first quarter after resignation, 75% for the second quarter, 50% for the third quarter, and 25% for the fourth quarter.

After the expiration of licenses in effect at the time of a member's resignation, under the current practice it would [fol. 236e] be possible to make no further distributions to that member although (1) his works might continue thereafter to be licensed by the Society under grants from the publisher or co-writer of such works, and (2) the resigning member had not purported to grant performing rights for the subsequent period to another licensing agency.

The Department of Justice lawyers contended that this possible treatment of such resigning members tends to restrict a member's freedom (1) to leave ASCAP and (2) his freedom to license his works through a competing organization.

The Department claimed that the existing rules prevent a member (1) from taking his works out of ASCAP or (2) from receiving adequate compensation for their performances after his resignation, even though the Society continues to license them as part of its repertory.

We have tried to deal with this fairly.

Thus, Section I of the proposed Consent Order provides that a resigning member shall continue to receive distributions on the same basis as an active member of the Society. This is true so long as his works continue to be licensed by ASCAP and by no other performing rights organization, either (a) under licenses in effect at the time of his resignation or (b) under licenses made after resignation but while the publisher or co-writer of the works in question continues to license such works through ASCAP.

There is, however, one qualification on this provision: The Society, at its option, may require that resigning members receive distribution solely on a 100% current performance basis. But if the Society exercises this option it must do so in the same way with respect to all resigning members.

[fol. 236f]

## II. THE SURVEY.

Now let me turn to the proposed survey.

Section II of the proposed Order concerns the new sur-

vey of performances of musical compositions by licensees of ASCAP.

ASCAP at present obtains a census of all music performances of network radio and television programs presented by CBS, NBC and ABC, which furnish ASCAP with reports thereof. In addition, ASCAP samples each day, by use of tape recorders located in 22 major metropolitan cities, a three-hour period of radio broadcasting by a station, selected randomly and in non-biased fashion, located in each of these areas, and samples a similar period of television presentation by randomly selected stations located in those areas.

ASCAP also receives three-hour tapes of local radio broadcasts from approximately 14 roving financial auditors who take daily tapes of radio stations located throughout the country in areas other than those represented by the 22 fixed locations. The tapes of local TV programs are supplemented by local film programs selected randomly from the "TV Guide" publications. The musical content of these films is obtained from film "cue sheets" which are available to ASCAP.

The Department contended, however, (1) that the local survey comprised too small a percentage of the total locally-emanating programs, (2) that the survey was not based on scientifically accepted principles of sampling design and control, and (3) that the monies received by ASCAP from the various major media such as (a) network radio, (b) network TV, (c) local radio and (d) local TV, were not being distributed in proportion to the performances in those media.

[fol. 236g] Specifically, the Department said that the Society was giving too much weight to radio and TV network performances and too little to local station performances.

Now, ASCAP was as anxious as the Department to set up a sound and workable survey on which to base its revenue distribution. What to do?

At my suggestion, Dr. Joel Dean of Columbia University, who, let me be clear, is no relative of mine, was engaged approximately a year ago to design and set up a new survey which would operate on a scientifically designed and conducted basis.

This complex task is now nearing completion.

It is not feasible to attempt to discuss the many mathematical refinements of the proposed survey. However, its salient features can be briefly and simply outlined.

(1) The Society will continue to obtain logs of all programs on the three major TV networks and all commercial programs on the CBS and NBC radio networks.

Radio network sustaining programs will be covered by the local survey and will receive appropriate credit when picked up in the local survey;

(2) The local radio survey will be enlarged by over 50% of its present size;

(3) The number of performance credits awarded for performances on the four major media surveyed, i.e., local radio, local TV, network radio and network TV, will be properly computed so that the number of performance credits each of those four media generates will approximate the proportion of the total ASCAP revenue attributable to each of those media; and

[fol. 236h] (4) The selection of sample tapes in the local survey will be based on a so-called scientific basis, which the experts call "random". The word "random" is not used in this context with its conventional meaning. Rather, it connotes a mathematical method of sampling selection that is wholly devoid of any bias, discrimination or "built-in" or personal objectives that might tend to favor one station or program over another.

The actual programs to be surveyed will be selected in accordance with mathematical tables similar to those commonly used for industrial sampling.

The significance of a "random" sample is that the probability or chance of picking up a performance on any given station or group of stations sampled is known, depending upon the depth or frequency of sampling with which the station or stations are sampled. No subjective, that is, personal or individual, considerations would be permitted to influence the selection of tapes, since that selection would be centrally controlled by an independent survey expert.

Now, if (1) the probability of surveying a given performance is known and if (2) the amount of ASCAP revenue attributable to the emanating station is known, then it is possible to multiply the surveyed performance by proper scientific multipliers that will take into account both of these factors.

Thus, a given surveyed performance will first be "blown-up" or multiplied to reflect the sampling frequency with which the particular station is sampled.

For example, if, on the average, one out of every 100 broadcasting hours of a station is sampled, a surveyed performance on that station would first be multiplied by 100. For purposes of sampling efficiency, stations within certain revenue-producing ranges will be grouped together for similar sampling treatment.

[fol. 236i] In addition to this sampling "blow-up" multiplier, each surveyed performance will be multiplied by an economic factor designed to reflect the differences in revenue contribution to ASCAP by the various stations sampled. Again, for the purpose of applying this economic multiplier, stations will be grouped into broad economic bands, for example, stations paying ASCAP from \$5,001 to \$10,000 a year, etc., will be treated alike.

Lastly, the combined product of these two multipliers—the sampling "blow-up" and the economic multipliers—will be further multiplied by arithmetical factors designed (1) to produce approximately 25,000,000 total ASCAP performance credits per year and (2) to allocate the performance credits attributable to the four major media sampled, i.e., (a) network TV, (b) local TV, (c) network radio and (d) local radio, in approximate proportion to the relative share of ASCAP income generated by each of those media.

Within each major medium the combined multipliers that I have mentioned will also produce an allocation of performance credits—the unit of measurement of the results of the survey—approximately in line with the revenue contribution of the various groups of stations sampled.

Thus, if a group of stations contributes 1% of ASCAP's local radio money, they will generate approximately 1% of the local radio credits.



The application of these principles does not mean that a single surveyed performance on a very large station will necessarily receive more credits than a surveyed performance on a very small station.

The Society, in general, will recognize the differences in license fees from various stations by taking more tapes from the big station than from the small. Therefore, although the economic multiplier for the large station may be, for example, ten times that for the small, the sampling "blow-up" multiplier for the small station may be ten times [fol. 236j] that for the large, and hence these two multipliers, when combined to produce a final arithmetical multiplier, would "cancel out" with the result that each of the two performances would ultimately be treated in approximately the same way.

Of course, in some instances there will be differences in the number of credits awarded to two similar performances on two stations of different size. But in the great majority of cases the credits awarded to similar performances on different local stations will fall within a fairly narrow range.

Because of the complicated interplay of statistical, economic and other "blow-up" factors needed to produce an estimated 25,000,000 total performance credits per year by the application of scientific sampling principles, the final arithmetical multipliers still remain to be worked out by an independent expert.

The proposed Consent Order also provides that an additional independent outside expert will be appointed by the Court to review the design and operation of the survey and to comment on its size, scope and accuracy to the Court; the Department of Justice, and ASCAP. In the event that the Department seeks to have the size of the survey increased at some future date, the Society can submit evidence to the Court as to the cost of any recommended increase.

The point is that the survey must be fair.

### III. THE DISTRIBUTION FORMULAE AND WEIGHTING RULES.

I now turn to Section III of the proposed Consent Order which concerns the distribution of the Society's revenues

among its members. For most of the members, this is probably the most significant part of the proposed Order. It affects your pocketbook and that is a vital nerve.

[fol. 236k] The Department of Justice contended that under the existing distribution plans, seniority of membership, age of composition, and the length of the period of averaging performance credits, were emphasized to such a degree that the writing and publishing of new songs by young writers and new publishers may be discouraged. If so, this would be against the public interest.

In addition, on the writers' side, the Department said that the carry-over effects of the pre-1950 classifications still dictated, to a substantial extent, the amount of distribution to many of the older writer members.

A great deal of time was spent with Department officials explaining the peculiar hazards and risks of the songwriting profession and the music publishing business, which you all know better than I, and the efforts that have been made by ASCAP to eliminate some of the "feast or famine" elements by such principles as "averaging".

The reasons for "seniority" and "availability" in ASCAP's distribution system were likewise explained at length. In part, the "seniority" principle recognizes that the Society was built to its present strength largely by members who received little return until fairly recent times; in further part, it served as a form of averaging over the long term.

The principle of continued "availability" recognized the added value to the Society's catalog, as a part of the ASCAP licensing package, of musical compositions which had firmly established their importance to the Society's licensees and thus contributed very importantly to the Society's revenues.

In addition, the Society pointed out that in many music uses, such as for theme and background music, generally speaking the value to the user of a well-known and well-established work far exceeds that of an unknown work that might be used as theme or background music. And this is [fol. 236l] for the reason that an audience, for the most part, immediately recognizes a well-known work and it automatically evokes certain fond or pleasant memories or as-

sociations which are of value to the user, who is willing to pay accordingly.

With respect to distribution generally, the Department argued that each member, whether a writer or a publisher, and without distinction between members, should receive—without any restriction—distribution solely on the basis of the Society's most recent performance records. If this were required, it would destroy ASCAP as we know it.

These two positions were reconciled by giving both writers and publishers an option either (1) to receive distribution solely on the basis of current performance credits or (2) to continue to receive distribution under plans essentially comparable to those now in effect.

I should like now to describe first the writers' distribution formula, and then to turn to the publishers' distribution formula.

#### A. WRITERS' DISTRIBUTION FORMULA, PRESENT AND PROPOSED.

1. *The Present System.* As you know, 50% of the net distributable revenue of the Society is paid to the writer members and 50% to the publisher members.

The Writers' distributable revenue is now divided into four funds: (1) The Current Performance Fund (20%); (2) The Sustained Performance Fund (30%); (3) The Availability Fund (30%); and (4) The Accumulated Earnings Fund (20%).

a. *The Current Performance Fund (20%).* Distribution from the Current Performance Fund is based solely on the current performance credits received by [fol. 236m] a writer member during the latest available fiscal survey year, each writer member sharing in the Fund in direct proportion to his current performance credits.

b. *The Sustained Performance Fund (30%).* Distribution from the Sustained Performance Fund is based upon the average number of performance credits received by each writer member during the preceding

five or ten years, at his option, subject to certain mathematical limitations on the rate of promotion or demotion in his standing in this Fund.

At the inception of the Sustained Performance Fund in 1950, the classifications of the writer members prior to that date were used as the initial basis for computing their standings in this Fund. Since that time, all classification movements by the writer members have been determined solely upon the basis of performances surveyed by the Society during the preceding five or ten years.

ASCAP annually calculates each writer member's classification, a point rating. Each such member then shares in the Fund quarterly on the basis of his points as a fraction of all Sustained Performance points of all writer members.

c. *The Availability Fund (30%)*. Since 1952, the Availability Fund has been distributed on the same mathematical basis as the Sustained Performance Fund, except that there are more restrictions on classification movements in the Availability Fund than in the Sustained Performance Fund.

In addition, before the value of classification points in this Fund is computed, up to \$50,000 per quarter may be deducted from this Fund for special awards to writers of works having a unique prestige value or works performed in media not surveyed by the Society.

[fol 236n] d. *The Accumulated Earnings Fund (20%)*. A writer's participation in the Accumulated Earnings Fund is computed by multiplying the average of his Sustained Performance and Availability classifications by the quarters of his continuous membership in ASCAP. In this way there is obtained his Accumulated Earnings points, which determine his share of this Fund.

## 2. *The Proposed System.*

a. *Current Performance Option*. Now let me turn to the proposed system. Under the proposed Order, any writer member would be permitted to elect to receive payments solely on the basis of current per-

formance credits earned in the prior fiscal survey year, except that if the writers classified at 975 points—39,000 performance credits divided by 40 = 975—and above 975—currently the top approximately 100 writer members in ASCAP—vote in a special election to be held for that purpose, to withhold from themselves the current performance option, then the current performance option would be applicable only to the first 39,000 annual performance credits of an electing writer, or the lowest number of average performance credits of any writer from whom the option is withheld, if that lowest number should be higher than 39,000.

For credits earned in excess of such number, a writer electing the current performance option will be paid on the basis of the four-fund system. That is, such a writer would share in the 20% Current Performance Fund on the basis of all credits received by him; in addition, he would be given rankings in the other three funds as if his one-year total were a five-year average, but those rankings would then be reduced by 975 points, the value represented by the credits for which [fol. 236o] he would be paid on the current performance option basis.

Approximately the top 100 writer members will be given an opportunity to decide for themselves as a group, by a majority vote of such writers, to withhold the current performance option from these 100 writer members.

For the purpose of this vote a majority shall require both (1) a majority of those writers who vote in such election and (2) writers who together hold a majority of the total average performance credits of all those writers who vote in such election.

In the event that the top writers vote to withhold the current performance option from themselves, another such election to determine whether they wish to continue withholding the option may be called at the end of three years by a petition signed by either (1) 25 in number, or by 25% of such top writer members, the percentage to be computed on either a mem-

ber or an average credit basis, or (2) by the Department of Justice.

The theory underlying this provision of the proposed Order is that the writers with the most performance credits in ASCAP should, if they wish, be permitted the opportunity to continue their present practice of receiving considerably less money per performance credit than do those writers whose works have received fewer performance credits. The result is that the amounts so withheld from the writers with the most performance credits are pro-rated among the other writer members with fewer performance credits, thereby appreciably benefiting the majority of the writer members, and thus helping to promote the Society and the songwriting profession as a whole.

[fol. 236p] Under the proposed Order, a writer would be permitted to elect the current performance option for any subsequent survey year.

But, having so elected, he would for bookkeeping reasons be initially bound to that option for two years. If he later returned to the four-fund system, and thereafter again chose the option within the next five years, he would then be bound to the current performance option for five years.

A writer member who elects the current performance option may thus return to the four-fund system. In that event, however, he receives no credit in the Membership Continuity Fund for the period of his current performance election in which his current performance credits did not exceed 39,000 or such higher number as already described.

For purposes of computations for the Average Performance and Recognized Works Performance Funds, a writer cancelling his current performance election will have his performance credits, if any, for the years next prior to his election credited as if they were received in the years immediately preceding his return to the four-fund system.

b. *The Four-Fund System.* For those writers who continue to receive payment on the four-fund system, several changes would be made in that plan.



Let me outline them as follows:

(1) The Current Performance Fund (20%) would continue in the same form as it is today.

(2) The Average Performance Fund (30%) would replace the present Sustained Performance Fund and would operate in essentially the same fashion, i.e., on the basis of the most recent five-year performance credit average of each writer member.

[fol. 236q] To meet the views of the Department of Justice, two significant changes would be made in that Fund, however: (1) writers would not be permitted to elect a ten-year rather than a five-year average, and (2) (a) classification increases based on the most recent available five-year averages would be spread over a two-year period and (b) decreases would be spread over a three-year period, rather than according to the complicated mathematical limitations on classification movements now in effect.

Please note the hypothetical examples set forth in the Appendix hereto which, although not part of the oral remarks, are furnished as a guide which members may find helpful in seeing how classification increases and decreases would be calculated under the new plan.

(3) The Availability Fund (30%) would be replaced by the Recognized Works Performance Fund, which would be distributed on the same basis as the Average Performance Fund, except that payment out of this Fund would be limited to credits received by works performed at least four quarters after their first surveyed performance.

The basic theory underlying the Recognized Works Performance Fund is that songs become more valuable to the user as they demonstrate the durability of their public acceptance. It is firmly believed by the Board of Directors and counsel as a fundamental principle of ASCAP that those songs which are per-

formed long after their initial "plug" period contribute more overall to the continued value of the Society's catalog than do brand new works that may be performed a comparable number of times during the same survey year.

[fol. 236r] Because of the special place of fond memories or pleasant recollections that well-known and established songs hold in the minds and hearts of an audience, it is believed that their value cannot be equated on a straight one-for-one performance basis with compositions that have not yet attained comparable recognition stature with listeners or viewers of all ages and different economic means.

Thus, time and again in the negotiations with the ASCAP licensees, it has been emphasized in one way or another that the key bargaining assets of the Society with the users, which their directors can utilize as they see fit, are its standard songs and established catalogs and their continued availability.

The Recognized Works Performance Fund would recognize this added contribution by compensating, in that Fund, only for performances of songs that had demonstrated a degree of sustained public recognition and demand.

Without this Fund, there would be no distinction in the credit awarded to different songs, except for the Weighting Rules, despite the very real differences in value to the user that exist between transitory "hits" and works of lasting public acceptance.

Of course, writers classified below 975, or those classified in 975 and above in the special election, may elect to be paid on a 100% current performance basis. They may thus avoid being subject to the application of the Recognized Works Fund.

(4) The Membership Continuity Fund (20%) would replace the Accumulated Earnings Fund (20%). It would be distributed on the basis of (a) a member's continuous quarters of membership, not to exceed 42 years, and (b) the member's Average Performance Fund rating, rather than, as at present,

[fol. 236s] on the basis of the average of his Sustained Performance and Availability ratings.

(5) Before any distributions are made to the writer members under the current performance option or the four-fund plan, up to 5% of the writers' distributable revenue can be deducted for the purpose of making awards for works of unique prestige value or for works substantially performed in media not surveyed by ASCAP.

Awards under this provision will be made by an independent panel of experts and will be announced by the Society to all writer members in advance of payment. Some members may dislike the publicity but, on the theory of the right of the public to know, it permits any member who believes that he has been overlooked or that the awards are inadequate or improper in any respect, to apprise the Society of his views.

. . . . .

The Department has agreed that the Writers' Distribution Formula which I have just outlined complies with the proposed Order.

The proposed Order itself requires that at least 20% be distributed on the basis of current performances and at least 30% on the basis of average performance credits.

The Order further requires, and I call your specific attention to the change in wording, that not more than 30% be distributed on the basis of performances of Recognized Works and not more than 20% on a basis which includes continuity of membership.

The over-all Writers' Distribution Formula, consisting of the inter-related Four Funds and the Current Performance Option, have been given the most serious consideration [fol. 236t] by your Board of Directors and counsel. It may not be amended by the Society itself without 30 days' prior written notice to the Department, and any amendments would have to conform to the proposed Order. Changes cannot be made in one fund without affecting the inter-related parts and consequently the rights of individual members. No proposed change can therefore be considered alone.

## B. PUBLISHERS' DISTRIBUTION FORMULA, PRESENT AND PROPOSED.

Now let me turn to the Publishers' Distribution Formula.

1. *The Present System.* Let me take up first the present system. The publishers' distributable revenue is divided into three funds: (1) The Current Performance Fund (55%), (2) The Availability Fund (30%), and (3) The Seniority Fund (15%).

a. *The Current Performance Fund (55%).* The Current Performance Fund is distributed on the same basis as the Writers' Current Performance Fund, i.e., the number of current performance credits received by each publisher during the latest available fiscal survey year determines the extent of its participation.

b. *The Availability Fund (30%).* The Availability Fund is distributed on the basis of a five-year accumulation of performance credits attributable to performances of works that were picked up in the Society's survey two years prior to such performances, i.e., compositions that have demonstrated a substantial degree of durable public acceptance.

c. *The Seniority Fund (15%).* Participation in the Seniority Fund is determined by multiplying the number of performance credits earned by each publisher member during the latest available five fiscal survey [fol. 236u] years by the number of quarters that such publisher has been a member of ASCAP.

### 2. *The Proposed System.*

Now, let me explain the proposed Publisher's Distribution Formula.

a. *The Current Performance Option.* The publishers, like the writers, will also have the opportunity of electing to receive distributions solely on a current performance basis.

However, inasmuch as the publishers will lose their seniority ratings over a five-year period, and unlike the writers, will not have the right to elect a five-year

average, in order to avoid sharp initial dislocations of income which many publishers have relied on in the past, this option will be graduated over a period of five years on the following basis:

For the first applicable fiscal survey year, an electing publisher would receive 75% of the amount to which he would be entitled if all publishers were on a current performance basis. For the second year, 80%, and so on until after five years, i.e., in 1964, any publisher electing the current performance basis of distribution would be entitled to 100% of the amount he would get if every publisher were paid solely on a current performance basis.

Alternatively, a publisher can continue on the regular plan for several years and then move over to a current performance basis, at that time receiving whatever the applicable percentage may be for that year on the current performance side. Once, however, a publisher shifts to the current performance basis, he will continue to receive payment under that system.

b. *The Three-Fund System.* For those publishers preferring not to receive distribution solely on the basis [fol. 236v] of current performances, several significant changes will be made from the existing system:

(i) The Current Performance Fund (55%) will remain the same.

(ii) However, the Availability Fund (30%) will be replaced by the Recognized Works Performance Fund and payment therefrom will be on the basis of credits earned during the preceding fiscal survey year, rather than during the five preceding years, by songs at least one year old—in terms of performance—rather than two years.

(iii) The Seniority Fund (15%) will be replaced by the Membership Continuity Fund. This Fund will be phased out at the rate of 3% a year, with a corresponding increase in the Current Performance Fund, so that after five years 70% of the money paid out under the regular plan will be on the basis

of current performance credits and the remaining 30% will be paid out on the basis of Recognized Works.

### C. FOREIGN REVENUE.

I now turn to the question of foreign revenues.

The Department has questioned the present method of distributing the royalties which ASCAP receives from approximately 22 foreign societies.

It is the current practice of ASCAP to distribute Canadian, English and Swedish revenues on the basis of the respective reports received from those countries; these sources furnish ASCAP complete reports in usable form for distribution. All other foreign revenue is currently distributed on the basis of English and Swedish reports.

ASCAP has agreed that if the revenue from any foreign source exceeds \$200,000 per annum, and the reports furnished ASCAP allocate credit in reasonably identifiable form separately by compositions performed and indicate the members in interest, such revenue will be separately distributed on the basis of those reports. Other foreign revenue will be distributed on the basis of the most reliable information ASCAP has as to foreign performances generally.

ASCAP has received more than \$200,000 per annum from England since 1943, from France since 1952, from Canada since 1953, and from West Germany since 1955. The French and German reports are in usable form, however, only with respect to non-film performances. Accordingly, it has been agreed that French and German non-film reports will be used for the distribution of French and German non-film revenue, and added as a basis for distributing foreign non-film revenues generally.

At the present time no other country making a significant contribution to ASCAP furnishes reports that could be economically used as the basis for distributing its revenue.

If, in the future, the Society receives \$200,000 a year or more from any country that provides adequate and comprehensible reports, ASCAP will endeavor to use those reports to the extent reasonably possible.



#### D. WEIGHTING RULES, PRESENT AND PROPOSED.

Next, let me discuss the present and the proposed Weighting Rules.

1. *The Present Rules.* At the present time, when a performance of an ASCAP composition is picked up in the survey, it is given an initial value through reference to the "Weighting Rules."

The basic unit of measurement under these rules is a "performance credit."

[fol. 236x] Each feature use of an ASCAP work, except public domain arrangements and certain serious works, is awarded one performance credit, multiplied by the number 20 in the case of locally-emanating performances and, in the case of commercial network performances, by the number of stations carrying the program in question.

A further multiple of 3 is then applied if the surveyed performance was on television rather than radio. This was done in an attempt to correlate the number of performance credits generated by the two media with the relative amounts of ASCAP revenue from those media.

In 1957, for example, 52% of ASCAP's revenue came from television and 36% from radio. On the other hand, television would have accounted for only 30% of the combined radio-television performance credits, if performances on both media were treated alike.

The multiple of 3 for television credits was an attempt to restore the balance between performance credits and revenue received from the two media, with the result that 56½% of the credits went to television performances, and 42½% to radio performances.

These figures change from time to time and will be under review by the independent expert to be appointed by the Court.

Non-feature uses, i.e., as a theme or jingle or as background, cue or bridge music, have been awarded fractional credit unless the work so used had previously accumulated substantial performance credits, thereby generally indicating its wide recognition or associative value for the audience of the user.

Credit for these non-feature uses ranges from 1% to 100% credit, depending upon the prior history of the work so used. This disparity in credit was one of the things which the Department of Justice criticized.

[fol. 236y] Music with no substantial prior history of performance is awarded credit on a time basis when used as background music, i.e., 20% credit for each three minutes thereof.

Music lacking a history of substantial prior performances have been awarded 1/10 of 1% credit when performed as non-feature music by less than four instruments. This was done in order to prevent a disproportionate allocation of royalties for such uses of unknown works when performed by organists or pianists on oft-recurring programs such as daytime dramatic serials.

Multiple performances of the same work on the same program are given 10% of the otherwise applicable credit for each subsequent performance after the first one on that program.

Serious works requiring four minutes or more for a single complete rendition are given extra durational credit when performed for four minutes or more.

Copyrighted arrangements of works otherwise in the public domain receive from 20% to 100% credit depending upon the amount of original material contained therein.

## 2. *The Proposed Formula*

I now turn to the proposed new Weighting Formula.

The Board and counsel believe that the weighting principle is fundamental to the essential philosophy of ASCAP.

In a non-feature use, a well-known song will generally be performed only with the specific intent of projecting the content image or memory associated with that song into the format or storyline of the program. Thus, such a use is given a prominent place in the program throughout the period of its performance.

An unknown or relatively unknown composition, on the other hand, can be performed in a non-feature role with only passing or brief atmospheric effect on the audience.

[fol. 236z] Under the proposed Order, the Weighting Rules applicable to credit for uses as themes, jingles, background, cue and bridge music would be substantially revised, as I shall describe later.

a. *The Qualifying Test.* A new, and we think sounder, test has been developed for determining which songs will qualify for more than minimum credit when used as non-feature music. For full credit when so used a song must

(a) have accumulated 20,000 *feature* performance credits, *i.e.*, credits not earned for theme, jingle, background, cue or bridge uses, and (b) have earned 2,500 *feature* performance credits during the five most recent survey years, towards which number not more than 750 can be counted in one year.

The latter requirement would be reduced proportionately for songs with less than 5 years of performance credits. In addition, 25%, 50% and 75% credit will be awarded to partially qualifying songs when used as themes and 50% credit for partially qualifying songs when used as background music.

A "Theme" is defined as a musical work used as an identifying signature of a radio or television personality or of all or part of a radio or television program or series of programs. A musical work (other than a jingle) used in conjunction with a commercial announcement shall receive the same credit as a theme.

"Background Music" is defined as mood, atmosphere or thematic music performed as background to some non-musical subject matter being presented on a radio or television program. A vocal or a visual instrumental rendition of a work on any medium shall not be regarded as background music regardless of the context in which performed.

[fol. 236aa] Thus, the new test has a double requirement: (1) the work must have attained a sufficient "hit" status at one time to indicate its audience recognition value and (2) it must have enjoyed some recent popularity, indicating that it is still alive in the minds of many listeners and will invoke response.

For works first performed before 1943, when the Society began to maintain adequate records of performance credits, the 20,000 feature credit requirement could be met if the work were listed in (1) the publication "Variety Music Cavalcade", published by Prentice-Hall in 1952, (2) as one of the "top ten" hits on the "Lucky Strike Hit Parade" or (3) as one of the "top ten" on the weekly lists of the most popular songs published in *Variety* or (4) *Billboard*.

"Variety Music Cavalcade", the "Lucky Strike Hit Parade", *Variety* and *Billboard* were selected for this purpose because, in the considered opinion of the Board of Directors and management of ASCAP, they represent the best available reference sources for ascertaining the status of works performed before 1943. Not including other references would probably be only a theoretical or academic omission because almost all "hit" songs performed before 1943 and which have received 2,500 feature performance credits in the five latest survey years are probably included in one of the lists referred to. Or, if not listed in any of them, they probably would have received 20,000 feature performance credits since 1943.

Between 1943 and 1955, the Society's records did not clearly indicate whether credits were for feature performances or for non-feature performances such as theme and background music. If a work first performed after January 1, 1943, appeared in any of the above-mentioned publications, it would be presumed that credits earned by it prior to October 1, 1955, were for [fol. 236bb] feature performances; if it has not so appeared, and if the work has not earned the required number of performance credits within its first two years, the burden would be on the member to establish that performance credits recorded for his work between 1943 and 1955 reflected feature performances. Of course, the records of the Society would be open to a member for that purpose.

For your information, the Society has been surveying all radio network performances since 1936, by use

of logs furnished by the networks. A similar survey of television network performances was started in 1949.

A sample survey has been conducted of local radio programs since 1950, and of local television programs since 1951. The local surveys have been conducted by taking tape recordings of sample programs, supplemented in the case of local television by the use of "TV Guide" and film "cue sheets". In addition, the Society has surveyed performances by symphonic and concert licensees.

Starting January 1, 1943, dates of all performances were recorded and, when the local surveys started, performances on local radio and television were so noted. It was not until October 1, 1955, however, that the records of the Society indicate the various uses of a given performance, for example, feature use, theme, background, jingle, etc.

#### b. *Credit Provisions*

I turn to the credit provisions in the Weighting Formula:

(i) *Feature Performance*. All uses except those credited as themes, jingles, background music or cue and bridge music, as defined in Section A of the Weighting Rules, are described as "feature performances".

[fol. 236cc] Each feature performance of a work, except public domain arrangements and certain serious works, which I discuss later, will be awarded full credit, except that (a) each repeated use of the same work on a single program after the first one, will receive only one-tenth credit, with a maximum of two full credits for any single program and (b) credit will not be allowed for more than eight feature performances per quarter hour.

(ii) *Themes*. A "qualifying work", when used as a theme, will be awarded 100% credit, or 75% or 50% or 25% credit, depending upon its past history of feature performance, for all such uses within the first hour of any two hour period, and

one-tenth of the otherwise applicable credit for all additional such uses during the second hour.

A "non-qualifying" work used as a theme will receive 10% credit for all such uses within the first hour of any two-hour period and 1% credit for all additional such uses during the second hour.

Musical works, other than jingles, used in conjunction with a commercial announcement will receive the same credit as a theme.

(iii) *Background Music.* A qualifying work used as background music will receive full credit or 50% credit depending on its history of prior feature performances.

Non-qualifying works will receive 20% credit if they have been commercially published for general public distribution and sale, if commercial recordings have been made as "singles" for general public distribution and sale, and if five feature performances of the work have been recorded in the local radio sample survey in the five preceding fiscal survey years.

[fol. 236dd] For each repeated use on a single program after the first one, one-tenth of the credit provided above will be awarded, with a maximum of two times the credit awarded for the initial performance.

Other non-qualifying background music on each program will receive, for each three minutes' duration in the aggregate for that program, 20% credit; fractions of three minutes will be computed on the basis of 5% for each 45 seconds or major fraction thereof.

(iv) *Cue and Bridge Music.* Let me now turn to cue and bridge music.

"Cue Music" is defined as music used on a radio or television program to introduce, but not to identify, a personality or event thereon. The term "cue music" includes, but is not limited to, introductions, "play-ons", and "play-offs".

"Bridge Music" is defined as music used on a radio or television program as a connective link between segments or portions thereof.



A qualifying work used as cue or bridge music will receive 10% credit for all uses during the first hour of any two-hour period and 1% credit for all such uses in the second hour.

A non-qualifying work will receive 1% credit for all uses during the first hour and 1/10 of 1% credit for all such uses in the second hour.

(v) *Jingles*. I turn now to jingles.

A "Jingle" is defined as a musical message containing commercial advertising matter, where (a) the musical material was originally written for commercial advertising purposes or (b) the performance is of a musical work, originally written for other [fol. 236ee] purposes, with the lyrics changed for commercial advertising purposes with the permission of the ASCAP member or members in interest.

Unlike the present Weighting Rules, no distinction whatsoever shall be made in credit awarded to works used as commercial jingles. Jingles will each receive 1% credit for all uses during the first hour of a two-hour period of programming and 1/10th of 1% for all uses in the second hour.

(vi) *Copyrighted arrangements*. The credit provisions for copyrighted arrangements have been rewritten so as to permit from 10% to 100% credit, depending upon the amount of original new material, either lyric or melodic.

(vii) *Other Provisions*. Other provisions of the proposed Weighting Rules permit the Society to limit the credit that may be awarded to works performed on dramatic programs 15 minutes or less in duration, presented two or more times a week.

The Society will continue to give extra durational credit for surveyed works which require four minutes or more for a single, complete rendition thereof, and which in their original form were composed for a choral, symphonic or similar concert performance, including chamber music, when those works are actually performed for the periods of time specified.

A durational credit system was inaugurated in 1945 and assumed its present form in 1955 for local performances and in 1957 for network performances.

In addition, performances of concerts by symphony orchestras on national network sustaining programs may be awarded credit equal to performances on a network of 50 stations. Works performed on all other [fol. 236ff] radio net work sustaining programs will receive credit when picked up in the local survey.

ASCAP may also distribute to its members, for performances of their works in concert and symphony halls, amounts five times the amount of the license fees received from ASCAP's concert and symphony hall licensees.

• • • • •

That concludes the discussion of the Weighting Formula.

But before leaving the subject of weighting, let me explain the difference between two documents which all members received.

One document, entitled "Weighting Rules", appears as Attachment C to the proposed Order itself. These general provisions govern what may be contained in any detailed weighting formula which the Society adopts, unless a revision of the Weighting Rules should be ordered by the Court.

The "Weighting Formula" which the members also received as a part of the same booklet, contains the detailed weighting provisions which the Department has agreed initially comply with requirements of the Weighting Rules.

The Weighting Formula may not be amended by the Society without 30 days' prior written notice to the Department, and any amendments would likewise have to conform to the Weighting Rules attached to the Order itself or to a Court-ordered revision thereof.

[fol. 236gg]

#### IV. VOTING.

Let us now turn to Section IV of the proposed Consent Order, which provides for the new voting formulae, and which would substantially change the present method of allocating votes.

### A. PRESENT SYSTEM.

At present, each writer member has one vote for every \$20 of annual ASCAP income and each publisher member has one vote for every \$500 of annual ASCAP income, with no limit on the number of votes held by any one member.

Elections for directors have been held once, every two years.

Of the 12 writer members of the Board of Directors, one has been a Director since 1920, two were first elected in the 1930's, two in the 1940's, and the remaining seven in the 1950's, including two in 1957 and three in 1959.

There are 12 publisher directors. Two publishers have been represented on the Board of Directors since 1914, two since 1924, one since 1938, two since 1939, one since 1947, three since 1957 and one since 1959.

### B. PROPOSED SYSTEM.

Under the proposed Consent Order, votes would be allocated solely on the basis of performance credits earned in the preceding fiscal survey year, rather than on dollar revenue. The votes would be computed in accordance with a diminishing returns formula under which a member would have to earn progressively more credits for each additional vote.

No member—writer or publisher—would be allowed more than 100 votes.

[fol. 236hh] The new voting rules provide other significant changes:

1. If at any time there is an increase of more than 10% in the percentage of total publisher votes held by the top ten publisher members and their affiliates, the publishers' voting formula must be revised to bring the votes of such publishers back within 10% of the amount which they would initially hold under the new voting formula.

The top ten publisher members and their affiliates would, according to the latest available figures, initially hold about 37% of the total publisher votes; thus, the maximum which could be held by any ten publishers, including their affiliates, would be about 41%.

For your information, the top 50 publishers out of a total of about 1400 publisher members would, according to the latest available figures, have 2,479 out of a total of 4,908 publisher votes, or 50½% of the total. Fourteen of these publishers are affiliated with others among the top 50, so that the foregoing statistics represent 36 separate publisher members and affiliates.

The new publishers' voting formula will reduce the voting strength of the top ten publishers and their affiliates from about 63% at present, to about 37% of the total publisher votes; it will also reduce the voting strength of the top 50 publisher members from about 78% at present, to about 50% of the total publisher votes.

The twelve publisher members of the Board of Directors, including affiliated publishers, would initially have about 1,507 out of a total of 4,908 publisher votes, or slightly over 30% of the total. This is a substantial reduction from 56% of the votes under the voting system now in effect. Under the new formula, of the 12 publisher members of the Board of Directors, including affiliated companies, one would have 424 votes, one would have 394 votes, three would have between 108 and 253 votes, three would [fol.236ii] have between 39 and 98 votes, and four would have between one and six votes.

2. In any election for the Board of Directors, 25 writer members may nominate an eligible person as a writer director, and 25 publisher members may nominate an eligible person as a publisher director.

3. Any group of writer or publisher members representing 1/12th of all the writer or publisher votes, as the case may be, can elect one director by signing a petition in his support at least 90 days before the date of any scheduled directors' election.

In that event, the number of directors to be elected in the general election would be reduced by the number of directors elected by petition. Members who elect a director by signing such a petition naturally would be precluded from voting again in the general election.

It would take publishers with an estimated 409 votes to elect a publisher director under the above provision. This

would require a varying number of publisher members. Thus, it would take 409 of the 628 publisher members who have only one vote each to elect a publisher director. On the other hand, there are four publisher members, not presently represented on the Board of Directors, who together have enough votes to elect a member of the Board of Directors under this proposal.

On the writers' side, it is estimated that there will be in excess of 15,000 eligible votes under the new system. Thus, it will take about 1,300 votes to elect a writer member of the Board by petition.

4. An election of directors must be held within one year after the effective date of the proposed Order, probably early in 1961. All directors shall be elected at the same [fol. 236jj] time, except for those elected by petition, and the number of directors shall not be less than 24.

The voting provisions contained in the proposed Order attempt to give fair recognition to the fact that the more than 6,000 members of ASCAP make varying contributions to the value of the available ASCAP repertory.

At the same time, however, these provisions would substantially broaden the base of present voting strength. As a result, the members with the most popular catalogs would receive a far smaller percentage of the total votes than the percentage of total ASCAP performance credits attributable to their catalogs.

Other provisions that I have mentioned attempt to give minority groups an opportunity to get together to nominate or elect a director to represent their views on the Board of Directors.

## V. INFORMATION AND COMPLAINT PROCEDURES.

I now turn to the provisions respecting information and complaint procedures.

### A. ACCESS TO SOCIETY'S RECORDS.

Under the proposed Order, ASCAP would be required to make available for inspection by any member a list of the mailing addresses of all members, except those mem-

bers who refuse to have their addresses revealed, in which event ASCAP will forward, unopened, any mail addressed to that member in care of ASCAP.

Within nine months after the end of each survey year, ASCAP would prepare alphabetical lists of all the compositions that received performance credits during that year, indicating thereon the number of credits received by each.

[fol. 236kk] In addition, the Society would maintain records showing the number of feature performance credits received during the five preceding fiscal survey years by all works that received credit during the preceding year as a theme or as background, cue or bridge music.

Any member or his authorized agent will be permitted to inspect such lists and such records with respect to his own compositions. Other portions of such lists and records shall be available for inspection by any member or his authorized agent to the extent that inspection is sought *in good faith* in connection with any financial interest of such member *as a member*, as opposed to his personal or business interests apart from his membership in ASCAP. In this context "good faith" would embrace any legitimate interest of a member in respect to his relations with ASCAP so long as that interest was not inimical to the welfare of the Society.

All other records of the Society relating to distribution shall be open for inspection by any member or his authorized agent for *good cause*, which really means any sound, legitimate reason, provided that such member shall have been a member of ASCAP for at least one year prior to his request for inspection.

The object of these provisions is, of course, to safeguard each member's legitimate right to information affecting his participation in the ASCAP royalties, while at the same time preserving the privacy of other members' affairs from unnecessary inquiry. It would be impossible to list the many and varying instances or the facts under which inspection would be either proper or improper.

Hence, the concepts of "good faith" and "good cause" were adopted because they have been found both desirable and workable in other similar areas. They have frequently



been used as general statutory language governing the [fol. 236 ll] right of inspection and have worked well. They are not just legal gobbledygook words.

## B. THE COMPLAINT PROCEDURE.

Under the proposed Consent Order, ASCAP would be required to establish a Special Board, elected in the same manner as the members of the Board of Directors, to entertain complaints by a member relating (1) to the distribution of ASCAP revenue to such member or (2) to any rule or regulation of the Society directly affecting distribution of the Society's revenues to such member. Currently, all such complaints are initially heard by the writers' or publishers' Classification Committees.

Under the proposed Order, a complaint would have to be filed within nine months of the receipt by a member of the annual statement or the rule or regulation on which his complaint is based.

Each member would have a direct right of appeal from any decision made by the Special Board to an impartial panel of the American Arbitration Association.

## VI. ADMISSION TO MEMBERSHIP.

The last subject-matter of the proposed Consent Order deals with admission to membership.

Any person whose application for membership has previously been denied between March 14, 1950, the date of the Consent Decree, and the effective date of the proposed Order, and who reapplies for ASCAP membership, will be admitted retroactively to the date of his initial application of 1950, whichever is later, if (1) he was eligible for membership at that date and (2) if he did not subsequently license, through another performing rights organization, the works upon which his qualification for membership is based.

[fol. 236mm] Assuming he qualifies for retroactive admission, this retroactive admission, in many instances, will be only for the purpose of seniority ranking.

Under the existing Consent Decree, ASCAP is not permitted to limit its membership by refusing admission to

duly qualified applicants. The proposed Order makes no change in this respect.

. . . . .

I am sure you will be delighted to know that this concludes my detailed discussion of the substantive provisions of the proposed Consent Order.

## VII. GENERAL REMARKS

Having tried your patience thus far, let me make some general remarks.

If the proposed Order and related documents are approved by Judge Ryan this fall, thereafter certain portions of the Articles of Association relative, for example, to voting and grievance procedures, will have to be submitted to the general membership of ASCAP for approval.

If the required membership approval is given, ASCAP will file with the Court a statement to that effect and the date of filing that statement will be the effective date of the Consent Order.

If the membership does not approve the necessary changes in the articles within the allowed time, which is three months, the Order will be vacated without prejudice to either party. In that event, the issues raised by the Department of Justice would have to be litigated.

This would mean not only great expense but complete uncertainty as to the result and its timing. In any event, in the ensuing period of litigation, ASCAP's position in [fol. 236nn] the industry would be jeopardized and its negotiations with its licensees would be seriously prejudiced.

Some members may feel that the changes which are proposed in the plan before you would adversely affect rights which they now have under the present system where, for example, they may have chosen the ten-year basis in the Sustained Performance Fund whereas it is proposed that everyone not electing the current performance option be put on a five-year basis in the Average Performance and Recognized Works Performance Funds.

Let me remind you that ASCAP and the members are operating under the 1950 decree of the Court. At the

start I read you Section XVII of that decree, which permits the Department of Justice to apply for further relief and the Court retains jurisdiction so it can grant further relief.

All rights of members in the distribution of revenue are subject to that basic document and to the Society's Articles of Association. Members' rights thus are not absolute rights.

If the proposed Order is approved by the Court and the necessary changes in the Articles of Association are approved by the membership, then the members will have the assurance of knowing what they will receive, under a plan which I believe is fair.

Unless circumstances change materially, you can rest assured the proposed plan will operate for the reasonably foreseeable future. But if there are completely new and different facts, the Department of Justice or the Court might call for new hearings.

If the proposed Order is not approved, the members will have no assurance of what the future holds in store, and if the matter is litigated, the result may well be far less attractive than what is being proposed today.

[fol. 23600] In order to keep my remarks within reasonable limits, I have not discussed some provisions in the Consent Order that speak for themselves and need no explanation, such as, for example, the number of performance credits needed for each vote.

I heartily recommend, however, that each member read carefully the proposed Consent Order and the documents filed therewith, as well as my explanatory memorandum sent to each member on July 21, 1959.

I further urge all members to bring any questions remaining unanswered to the attention of the Society well in advance of the hearing in October. We will do our best to answer you.

As you can see, I sincerely believe that the provisions contained in the proposed Order and related documents, if approved by the Court, will serve the best interests of the entire Society and the membership at large.

In an organization with relationships as complex as those here present, someone will always feel that certain

rules or regulations may work to his detriment, or that they ought to be changed in some respect which, at first, may seem to be very minor.

However, the proposed Consent Order and the related documents are carefully integrated parts—the warp and woof—of a single fabric of relationships.

Any one change may thus disturb the balance of these relationships. It may also require several further changes in order to preserve certain equitable principles sought to be served by the Consent Order, to which changes other members may not agree.

Thus, given the difficult problems posed by the Department of Justice, I think that the solutions represented by these provisions are on the whole fair and equitable.

[fol. 236pp] I also think the removal of the threat of major anti-trust litigation will permit the Society to function even more effectively and more harmoniously in the future than it has to date.

By accepting this decree we know that ASCAP will be kept alive as a continuing and united Society working in the best interests of all of its members.

In a complex situation such as this, compromise to some extent is always necessary. I have advised the Board that in my judgment a more satisfactory solution from the point of view of the Society's best interests probably could not be attained through litigation, although this is always a possibility.

Therefore, the Board of Directors, after extended investigation and the most serious discussion, and with the advice of counsel, has unanimously approved the proposed Order and it unanimously recommends that the necessary amendments to the Articles of Association be approved by the general membership.

In my negotiations with the Department of Justice and in my advice to the Board of Directors with respect to this proposed Consent Order, I have tried to represent the interests of all of the members of the Society, and to consider and balance their different interests.

I wish to express at this time to President Adams, his predecessor Paul Cunningham, Herman Finkelstein, general attorney of the Society, and to the Board of Directors

and to the Society generally, my pleasure in serving the Society in this most interesting and complex matter.

I also wish to thank the staff, the Society's general counsel, Messrs. Schwartz and Froehlich, and the Society's Washington counsel, Messrs. Cox, Langford, Stoddard and Cutler, for their unfailing co-operation.

Thank you very much.

[fol. 236qq]

## APPENDIX

### HYPOTHETICAL EXAMPLES PREPARED TO GUIDE MEMBERS IN CALCULATING CLASSIFICATION INCREASES AND DECREASES IN THE AVERAGE PERFORMANCE AND RECOGNIZED WORKS PERFORMANCE FUNDS.

The following examples illustrate how the provisions for classification increases and decreases in the Average Performance and Recognized Works Performance Funds would operate in four hypothetical situations.

The column "Actual Performance Credit Average" shows the classification points which the hypothetical member would have, based on his assumed five-year average performance credits, if there were no limitations on classification increases or decreases.

The column "Classification" shows the point classification assigned to the hypothetical member in the Sustained Performance Fund in 1958, and the point classification that would be assigned to him in the Average Performance Fund in 1959 and thereafter, based upon his assumed latest five-year average of performance credits and taking into account the limitations on classification increases and decreases.

The column "Computation" shows how the new point classification would be computed each year on the facts assumed in the examples.

Each member has his own records and knows his own actual facts, which presumably will be different from the facts assumed in the examples. The hypothetical examples may facilitate calculation by an individual member of how

the proposed plan would affect him. They are not actual cases.

[fol. 236rr]

Example A	Actual Performance Credit Average	Classification	Computation
1958		450*	
1959	350	425	$450 - 25 = 425$
1960	350	400	$425 - 25 = 400$
1961	350	375	$400 - 25 = 375$
1962	350	350	$375 - 25 = 350$

EXPLANATION: A point decrease between a 1958 Sustained Performance classification and a 1959 Average Performance classification (or between a 1958 Availability classification and a 1959 Recognized Works Performance classification) would be spread evenly over four years.

Example B	Actual Performance Credit Average	Classification	Computation
1958		450*	
1959	450	450	
1960	300	400	$450 - 50 = 400$
1961	350	375	$400 - 50 + 25 = 375$
1962	350	350	$375 - 50 + 25 = 350$

EXPLANATION: Except for decreases between 1958 and 1959 classifications, all point decreases are spread evenly over three years. Except for increases entitling a writer member to a classification of 1,000 or above, all point increases are spread evenly over two years.

\* 1958 Sustained Performance (or Availability) classification.



{fol. 236ss]

Example C	Actual Performance Credit Average	Computation	Classification
1958		450*	
1959	350	425	450 - 25 = 425
1960	400	425	425 - 25 + 25 = 425
1961	450	450	425 - 25 + 25
			+ 25 = 450
1962	500	475	450 - 25 + 25
			+ 25 = 475
1963	500	500	475 + 25 = 500

EXPLANATION: Point increase and decrease "carry forwards" are applied cumulatively and concurrently. For example, a portion of a 1959 decrease is applied at the same time as a portion of a 1960 increase.

Example D	Actual Performance Credit Average	Classification	Computation
1958		1,000*	
1959	1,000	1,000	
1960	900	950	975 - 25 = 950
1961	900	925	950 - 25 = 925
1962	900	900	925 - 25 = 900
1963	1,000	1,000	(No limitation)

EXPLANATION: There are no limitations on increases to Class 1,000 or above or on decreases from Class 1,000 or above to Class 975.

\* 1958 Sustained Performance (or Availability) classification.

Note: The above examples apply equally to the Average Performance and Recognized Works Performance Funds. The single difference between the computations for the two funds is that the performance credit average used for classification in the Recognized Works Performance Fund includes only credits attributable to surveyed performances occurring after the expiration of four quarters commencing with the quarter in which a performance of any given work is first recorded in the Society's survey.

[fol. 237]

## EXHIBIT "B" TO AFFIDAVIT

Murray Hill 8-8800 Cable Address: ASCAP, New York

AMERICAN SOCIETY OF COMPOSERS,  
AUTHORS AND PUBLISHERS575 Madison Avenue  
New York 22, New YorkSTANLEY ADAMS  
President

September 4, 1959

*To All Members of the Society:*

At the New York meeting, which was held on August 27, 1959, Mr. Arthur H. Dean, special counsel to the Society, addressed the meeting with respect to the proposed Consent Order which will be submitted to Chief Judge Ryan on October 19, 1959.

Because there are some additions and changes from his West Coast speech (particularly on pages 28 to 30, and 36 to 37) and because of the importance of the subject matter, Mr. Dean's speech in New York has also been printed and a copy is being sent herewith to all of the members of the Society.

Sincerely yours,

STANLEY ADAMS, *President*

[fol. 237a]

REMARKS OF MR. ARTHUR H. DEAN AT THE  
NEW YORK MEETING OF ASCAP ON  
AUGUST 27, 1959

President Adams and ladies and gentlemen of ASCAP:

We are met to-day to discuss the proposed Court Order and the other documents previously sent to members with respect to certain proposed amendments to the existing anti-trust consent decree.

As artists contributing to the great cultural values of the nation, I salute you.

When I was retained by the Society last summer, it soon became apparent that we should explore with the Department of Justice whether the questions raised by the Department could be resolved by agreement rather than by expensive litigation. This is always the duty of counsel.

A trial of these issues would have been very lengthy and expensive. Moreover, its outcome would have been difficult to predict because of the many serious anti-trust problems posed by the fact that ASCAP represents thousands of independent and competing writers and publishers.

The previous consent decrees entered under the anti-trust laws between the Government and ASCAP in 1941 and 1950 imposed many restrictions on the Society.

They have also served, in a certain sense, as charters which spelled out the broad areas in which, as a practical matter, the Society could operate thereunder, under the watchful eye of the Court, without fear of allegations of violation of the anti-trust laws generally from the Department of Justice.

I am going to try to make this as non-legal as possible, but let me be legal for just a moment and read to you from Section XVII of the 1950 Decree, which governs these Court proceedings:

"Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this Amended [fol. 237b] Final Judgment to make application to the Court for such further order and directions as may be necessary or appropriate in relation to the construction of or carrying out of this Judgment, for the modification thereof, for the enforcement of compliance therewith and for the punishment of violations thereof.

"It is expressly understood, in addition to the foregoing, that the plaintiff [the U. S. Government] may, upon reasonable notice, at any time after five years from the date of entry of this Amended Final Judgment [March, 1950] apply to this Court for the vacation of such Judgment, or its modification in any respect, including the dissolution of ASCAP."

You will see that our task as your counsel was to try to convince the Department of Justice not to make such an

application to the Court until we had had an opportunity to confer with them. Originally, the Department proposed to file an application to the Court around Labor Day last year.

In our first discussions with the Department of Justice lawyers, they contended that the 1950 consent decree, or ASCAP under it, did not adequately safeguard competition among the members of the Society in the writing and publishing of songs.

They claimed, for example, that the 1950 decree, or ASCAP under it, did not properly allocate, among the members, the revenues of the Society and the votes in the Society.

The Board of Directors of ASCAP and the Society's attorneys took issue with many of the Department's contentions. Nevertheless, we hoped that a satisfactory agreement could be made with the Government without jeopardizing the fundamental values of ASCAP and its great cultural benefit to the nation, or the basic principles served by its practices and policies.

[fol. 237c] After almost a year filled with many conferences between the Department of Justice and ASCAP attorneys, as well as a very careful review of ASCAP's practices and policies by its own Board of Directors, its management and its counsel, a proposed Consent Order and certain related documents were filed on June 29, 1959, in the Federal District Court in New York City, and a hearing was set for October 19, 1959, before Chief Judge Ryan.

Copies of the proposed Consent Order and the proposed distribution formulae and weighting rules were sent to all of the members last month.

There was also sent to you a memorandum I prepared describing, I hope simply and concisely, how the Consent Order would affect the Society's members.

One reason why the negotiations with the Department of Justice were so time-consuming was the fact—which was not surprising—that the Department, with its manifold duties, was not familiar with all of the details of the very specialized problems of ASCAP. This was true both with respect to ASCAP's unique position in the entertainment

field and with respect to the relations between ASCAP and its members.

Only through long discussions, which were directed for the most part at acquainting the Department lawyers with these problems, were your Society's attorneys able to find acceptable solutions to the issues raised by the Department. This was possible because, in the final analysis, the Department shared the common desire to frame a Consent Order that would be consistent with the success of the entire Society and in the best interests of the general membership and of the general public.

I should now like to go through the proposed Order with you, attempting to explain the meaning of its lengthy provisions, the objections of the Department that gave rise [fol. 237d] to those provisions, and the ways in which those provisions will require changes in the Society's rules and practices.

In addition, I will attempt to describe the theories underlying certain of those provisions which, on first reading, may not be clear to some of you. But they ought to be clear and I am delighted that you have taken the time and trouble to come and listen to the proposed changes.

Now this is going to be long and perhaps a bit tedious. But it affects your rights and I know of no other way to do it.

I propose to take up the proposed Consent Order, page by page, which has the distinct advantage of order and of not skipping around and possibly missing something, but the disadvantage of not taking up the most important provisions first.

#### I. RESIGNING MEMBERS.

First let me take up resigning members. The first section of the Consent Order relates to the treatment of resigning members whose works continue to be licensed by ASCAP.

It is the present practice of the Society to make distributions to former publishers only out of the Current Performance Fund (55%) and to make distributions to former writers only out of the Current Performance Fund (20%)

and the Sustained Performance Fund (30%), for performances of their works under licenses in effect at the time of their resignation.

Technically, this rule applies only to monies received from radio and TV licensees, for the distributions of the much smaller revenues from other licensees such as hotels and restaurants are "phased out" within one year after resignation on the basis of 100% parity for the first quarter after resignation, 75% for the second quarter, 50% for the third quarter, and 25% for the fourth quarter.

[fol. 237e] After the expiration of licenses in effect at the time of a member's resignation, under the current practice it would be possible to make no further distributions to that member although (1) his works might continue thereafter to be licensed by the Society under grants from the publisher or co-writer of such works, and (2) the resigning member had not purported to grant performing rights for the subsequent period to another licensing agency.

The Department of Justice lawyers contended that this possible treatment of such resigning members tends to restrict a member's freedom (1) to leave ASCAP and (2) his freedom to license his works through a competing organization.

The Department claimed that the existing rules prevent a member (1) from taking his works out of ASCAP or (2) from receiving adequate compensation for their performances after his resignation, even though the Society continues to license them as part of its repertory.

We have tried to deal with this fairly.

Thus, Section I of the proposed Consent Order provides that a resigning member shall continue to receive distributions on the same basis as an active member of the Society. This is true so long as his works continue to be licensed by ASCAP and by no other performing rights organization, either (a) under licenses in effect at the time of his resignation or (b) under licenses made after resignation but while the publisher or co-writer of the works in question continues to license such works through ASCAP.

There is, however, one qualification on this provision: The Society, at its option, may require that resigning members receive distribution solely on a 100% current perform-



ance basis. But if the Society exercises this option it must do so in the same way with respect to all resigning members.

[fol. 237f]

## II. THE SURVEY.

Now let me turn to the proposed survey.

Section II of the proposed Order concerns the new survey of performances of musical compositions by licensees of ASCAP.

ASCAP at present obtains a census of all music performances of network radio and television programs presented by CBS, NBC and ABC, which furnish ASCAP with reports thereof. In addition, ASCAP samples each day, by use of tape recorders located in 22 major metropolitan cities, a three-hour period of radio broadcasting by a station, selected randomly and in non-biased fashion, located in each of these areas, and samples a similar period of television presentation by randomly selected stations located in those areas.

ASCAP also receives three-hour tapes of local radio broadcasts from approximately 14 roving financial auditors who take daily tapes of radio stations located throughout the country in areas other than those represented by the 22 fixed locations. The tapes of local TV programs are supplemented by local film programs selected randomly from the "TV Guide" publications. The musical content of these films is obtained from film "cue sheets" which are available to ASCAP.

The Department contended, however, (1) that the local survey comprised too small a percentage of the total locally-emanating programs, (2) that the survey was not based on scientifically accepted principles of sampling design and control, and (3) that the monies received by ASCAP from the various major media such as (a) network radio, (b) network TV, (c) local radio and (d) local TV, were not being distributed in proportion to the performances in those media.

[fol. 237g]. Specifically, the Department said that the Society was giving too much weight to radio and TV network performances and too little to local station performances.

film reports will be used for the distribution of French and German non-film revenue, and added as a basis for distributing foreign non-film revenues generally.

At the present time no other country making a significant contribution to ASCAP furnishes reports that could be economically used as the basis for distributing its revenue.

If, in the future, the Society receives \$200,000 a year or more from any country that provides adequate and comprehensible reports, ASCAP will endeavor to use those reports to the extent reasonably possible.

#### D. WEIGHTING RULES, PRESENT AND PROPOSED.

Next, let me discuss the present and the proposed Weighting Rules.

1. *The Present Rules.* At the present time, when a performance of an ASCAP composition is picked up in the survey, it is given an initial value through reference to the "Weighting Rules."

The basic unit of measurement under these rules is a "performance credit."

[fol. 237x] Each feature use of an ASCAP work, except public domain arrangements and certain serious works, is awarded one performance credit, multiplied by the number 20 in the case of locally-emanating performances and, in the case of commercial network performances, by the number of stations carrying the program in question.

A further multiple of 3 is then applied if the surveyed performance was on television rather than radio. This was done in an attempt to correlate the number of performance credits generated by the two media with the relative amounts of ASCAP revenue from those media.

In 1957, for example, 52% of ASCAP's revenue came from television and 36% from radio. On the other hand, television would have accounted for only 30% of the combined radio-television performance credits, if performances on both media were treated alike.

The multiple of 3 for television credits was an attempt to restore the balance between performance credits and revenue received from the two media, with the result that

Now, ASCAP was as anxious as the Department to set up a sound and workable survey on which to base its revenue distribution. What to do?

At my suggestion, Dr. Joel Dean of Columbia University, who, let me be clear, is no relative of mine, was engaged approximately a year ago to design and set up a new survey which would operate on a scientifically designed and conducted basis.

This complex task is now nearing completion.

It is not feasible to attempt to discuss the many mathematical refinements of the proposed survey. However, its salient features can be briefly and simply outlined.

(1) The Society will continue to obtain logs of all programs on the three major TV networks and all commercial programs on the CBS and NBC radio networks.

Radio network sustaining programs will be covered by the local survey and will receive appropriate credit when picked up in the local survey;

(2) The local radio survey will be enlarged by over 50% of its present size;

(3) The number of performance credits awarded for performances on the four major media surveyed, i.e., local radio, local TV, network radio and network TV, will be properly computed so that the number of performance credits each of those four media generates will approximate the proportion of the total ASCAP revenue attributable to each of those media; and

[fol. 237h] (4) The selection of sample tapes in the local survey will be based on a so-called scientific basis, which the experts call "random". The word "random" is not used in this context with its conventional meaning. Rather, it connotes a mathematical method of sampling selection that is wholly devoid of any bias, discrimination or "built-in" or personal objectives that might tend to favor one station or program over another.

The actual programs to be surveyed will be selected in accordance with mathematical tables similar to those commonly used for industrial sampling.

561½% of the credits went to television performances and 421½% to radio performances.

These figures change from time to time and will be under review by the independent expert to be appointed by the Court.

Non-feature uses, *i.e.*, as a theme or jingle or as background, cue or bridge music, have been awarded fractional credit unless the work so used had previously accumulated substantial performance credits, thereby generally indicating its wide recognition or associative value for the audience of the user.

Credit for these non-feature uses ranges from 1% to 100% credit, depending upon the prior history of the work so used. This disparity in credit was one of the things which the Department of Justice criticized.

[fol. 237y]. Music with no substantial prior history of performance is awarded credit on a time basis when used as background music, *i.e.*, 20% credit for each three minutes thereof.

Music lacking a history of substantial prior performances have been awarded 1/10 of 1% credit when performed as non-feature music by less than four instruments. This was done in order to prevent a disproportionate allocation of royalties for such uses of unknown works when performed by organists or pianists on off-recurring programs such as daytime dramatic serials.

Multiple performances of the same work on the same program are given 10% of the otherwise applicable credit for each subsequent performance after the first one on that program.

Serious works requiring four minutes or more for a single complete rendition are given extra durational credit when performed for four minutes or more.

Copyrighted arrangements of works otherwise in the public domain receive from 20% to 100% credit depending upon the amount of original material contained therein.

## 2. *The Proposed Formula*

I now turn to the proposed new Weighting Formula.

The Board and counsel believe that the weighting principle is fundamental to the essential philosophy of ASCAP.

The significance of a "random" sample is that the probability or chance of picking up a performance on any given station or group of stations sampled is known, depending upon the depth or frequency of sampling with which the station or stations are sampled. No subjective, that is, personal or individual, considerations would be permitted to influence the selection of tapes, since that selection would be centrally controlled by an independent survey expert.

Now, if (1) the probability of surveying a given performance is known and if (2) the amount of ASCAP revenue attributable to the emanating station is known, then it is possible to multiply the surveyed performance by proper scientific multipliers that will take into account both of these factors.

Thus, a given surveyed performance will first be "blown-up" or multiplied to reflect the sampling frequency with which the particular station is sampled.

For example, if, on the average, one out of every 100 broadcasting hours of a station is sampled, a surveyed performance on that station would first be multiplied by 100. For purposes of sampling efficiency, stations within certain revenue-producing ranges will be grouped together for similar sampling treatment.

[fol. 237i] In addition to this sampling "blow-up" multiplier, each surveyed performance will be multiplied by an economic factor designed to reflect the differences in revenue contribution to ASCAP by the various stations sampled. Again, for the purpose of applying this economic multiplier, stations will be grouped into broad economic bands, for example, stations paying ASCAP from \$5,001 to \$10,000 a year, etc., will be treated alike.

Lastly, the combined product of these two multipliers—the sampling "blow-up" and the economic multipliers—will be further multiplied by arithmetical factors designed (1) to produce approximately 25,000,000 total ASCAP performance credits per year and (2) to allocate the performance credits attributable to the four major media sampled, i.e., (a) network TV, (b) local TV, (c) network radio and (d) local radio, in approximate proportion to the relative share of ASCAP income generated by each of those media.



Within each major medium the combined multipliers that I have mentioned will also produce an allocation of performance credits—the unit of measurement of the results of the survey—approximately in line with the revenue contribution of the various groups of stations sampled.

Thus, if a group of stations contributes 1% of ASCAP's local radio money, they will generate approximately 1% of the local radio credits.

The application of these principles does not mean that a single surveyed performance on a very large station will necessarily receive more credits than a surveyed performance on a very small station.

The Society, in general, will recognize the differences in license fees from various stations by taking more tapes from the big station than from the small. Therefore, although the economic multiplier for the large station may be, for example, ten times that for the small, the sampling "blow-up" multiplier for the small station may be ten times [fol. 237j] that for the large, and hence these two multipliers, when combined to produce a final arithmetical multiplier, would "cancel out" with the result that each of the two performances would ultimately be treated in approximately the same way.

Of course, in some instances there will be differences in the number of credits awarded to two similar performances on two stations of different size. But in the great majority of cases the credits awarded to similar performances on different local stations will fall within a fairly narrow range.

Because of the complicated interplay of statistical, economic and other "blow-up" factors needed to produce an estimated 25,000,000 total performance credits per year by the application of scientific sampling principles, the final arithmetical multipliers still remain to be worked out by an independent expert.

The proposed Consent Order also provides that an additional independent outside expert will be appointed by the Court to review the design and operation of the survey and to comment on its size, scope and accuracy to the Court, the Department of Justice, and ASCAP. In the event that the



Department seeks to have the size of the survey increased at some future date, the Society can submit evidence to the Court as to the cost of any recommended increase.

The point is that the survey must be fair.

### III. THE DISTRIBUTION FORMULAE AND WEIGHTING RULES

I now turn to Section III of the proposed Consent Order, which concerns the distribution of the Society's revenues among its members. For most of the members, this is probably the most significant part of the proposed Order. It affects your pocketbook and that is a vital nerve.

[fol. 237k] The Department of Justice contended that under the existing distribution plans, seniority of membership, age of composition, and the length of the period of averaging performance credits, were emphasized to such a degree that the writing and publishing of new songs by young writers and new publishers may be discouraged. If so, this would be against the public interest.

In addition, on the writers' side, the Department said that the carry-over effects of the pre-1950 classifications still dictated, to a substantial extent, the amount of distribution to many of the older writer members.

A great deal of time was spent with Department officials explaining the peculiar hazards and risks of the songwriting profession and the music publishing business, which you all know better than I, and the efforts that have been made by ASCAP to eliminate some of the "feast or famine" elements by such principles as "averaging".

The reasons for "seniority" and "availability" in ASCAP's distribution system were likewise explained at length. In part, the "seniority" principle recognizes that the Society was built to its present strength largely by members who received little return until fairly recent times; in further part, it served as a form of averaging over the long term.

The principle of continued "availability" recognized the added value to the Society's catalog, as a part of the ASCAP licensing package, of musical compositions which had firmly established their importance to the Society's licensees and thus contributed very importantly to the Society's revenues.

peared, and if the work has not earned the required number of performance credits within its first two years, the burden would be on the member to establish that performance credits recorded for his work between 1943 and 1955 reflected feature performances. Of course, let me be clear, the records of the Society would be open to a member for that purpose.

For purposes of this talk, I asked the staff of ASCAP to check the 377 songs in which the publisher members of the Board of Directors had an interest in April, 1958, and which, under the present rules, have received credit as fully qualifying works when used as themes.

My purpose was to use these songs as an example with respect to the part of the proposed qualifying test which requires that a song have accumulated 20,000 feature performance credits if it is to receive full credit as a qualifying work when used as a theme.

323 of the above-mentioned 377 works were first performed before January 1, 1943. Actual performance credits prior to January 1, 1943 under the new proposed rules are disregarded because of the inadequacy of the Society's records in those earlier years. However, 250 of those songs would satisfy the 20,000 feature performance credit test under the proposed rules because they appear in "Variety Music Cavalcade" or among the top ten on the "Lucky Strike Hit Parade", or among the top ten on the lists of most popular songs in *Variety* or *Billboard*.

Each of the remaining 73 of these 323 songs first performed before January 1, 1943 has received over 20,000 performance credits since it first appeared in the survey. However, for any of these 73 songs to satisfy the 20,000 feature performance credit requirement, such credits must have been received after January 1, 1943.

[fol. 237cc] The remaining 54 songs checked were first performed after January 1, 1943. 31 of them received 20,000 performance credits during the first two years after their first performance. Therefore, the rules provide a presumption that such credits were for feature uses.

In addition, the Society pointed out that in many music uses, such as for theme and background music, generally speaking the value to the user of a well-known and well-established work far exceeds that of an unknown work that might be used as theme or background music. And this is [fol. 2371] for the reason that an audience, for the most part, immediately recognizes a well-known work and it automatically evokes certain fond or pleasant memories or associations which are of value to the user, who is willing to pay accordingly.

With respect to distribution generally, the Department argued that each member, whether a writer or a publisher, and without distinction between members, should receive—without any restriction—distribution solely on the basis of the Society's most recent performance records. If this were required, it would destroy ASCAP as we know it.

These two positions were reconciled by giving both writers and publishers an option either (1) to receive distribution solely on the basis of current performance credits or (2) to continue to receive distribution under plans essentially comparable to those now in effect.

\* \* \* \* \*

I should like now to describe first the writers' distribution formula, and then to turn to the publishers' distribution formula.

#### A. WRITERS' DISTRIBUTION FORMULA, PRESENT AND PROPOSED.

1. *The Present System.* As you know, 50% of the net distributable revenue of the Society is paid to the writer members and 50% to the publisher members.

The Writers' distributable revenue is now divided into four funds: (1) The Current Performance Fund (20%); (2) The Sustained Performance Fund (30%); (3) The Availability Fund (30%); and (4) The Accumulated Earnings Fund (20%).

a. *The Current Performance Fund (20%).* Distribution from the Current Performance Fund is based solely on the current performance credits received by

Under the proposed rules, the 20,000 feature performance credit requirement is geared to a year when the total of all performance credits of all members of ASCAP was approximately 25 million. This feature performance requirement is subject to proportionate adjustments for years when the total performance credits of all members was less than 20 million or more than 30 million.

Three additional songs, among those checked, had 20,000 adjusted performance credits in their first two years, and, therefore, will receive the benefit of the presumption that such credits were for feature uses.

Three additional songs appeared in Variety Music Cavalcade or the other lists which I have mentioned. Therefore, the 20,000 or more performance credits which each of them received between January 1, 1943 and October 1, 1955 will have the benefit of the presumption that such credits were for feature uses.

Each of the remaining 17 songs checked, out of the 377 in which the publisher members of the Board of Directors had an interest, had 20,000 performance credits before being used as a theme. But as these 17 songs did not meet any of the foregoing special tests, the burden would be on the member to show that their performance credits received between January 1, 1943 and October 1, 1955 were for feature uses.

After October 1, 1955, the records of the Society indicate which performance credits were for feature [fol. 237dd] uses. After that date, the complications I have been discussing disappear.

For your information, the Society has been surveying all radio network performances since 1936, by use of logs furnished by the networks. A similar survey of television network performances was started in 1949.

A sample survey has been conducted of local radio programs since 1950, and of local television programs since 1951. The local surveys have been conducted by taking tape recordings of sample programs, supplemented in the case of local television by the use of "TV Guide" and film "cue sheets". In addition, the

[fol. 237in] a writer member during the latest available fiscal survey year, each writer member sharing in the Fund in direct proportion to his current performance credits.

b. *The Sustained Performance Fund (30%)*. Distribution from the Sustained Performance Fund is based upon the average number of performance credits received by each writer member during the preceding five or ten years, at his option, subject to certain mathematical limitations on the rate of promotion or demotion in his standing in this Fund.

At the inception of the Sustained Performance Fund in 1950, the classifications of the writer members prior to that date were used as the initial basis for computing their standings in this Fund. Since that time, all classification movements by the writer members have been determined solely upon the basis of performances surveyed by the Society during the preceding five or ten years.

ASCAP annually calculates each writer member's classification, a point rating. Each such member then shares in the Fund quarterly on the basis of his points as a fraction of all Sustained Performance points of all writer members.

c. *The Availability Fund (30%)*. Since 1952, the Availability Fund has been distributed on the same mathematical basis as the Sustained Performance Fund, except that there are more restrictions on classification movements in the Availability Fund than in the Sustained Performance Fund.

In addition, before the value of classification points in this Fund is computed, up to \$50,000 per quarter may be deducted from this Fund for special awards to writers of works having a unique prestige value or works performed in media not surveyed by the Society.

[fol. 237n] d. *The Accumulated Earnings Fund (20%)*. A writer's participation in the Accumulated Earnings Fund is computed by multiplying the average of his Sustained Performance and Availability classifications by the quarters of his continuous mem-



bership in ASCAP. In this way there is obtained his Accumulated Earnings points, which determine his share of this Fund.

## 2. *The Proposed System.*

a. *Current Performance Option.* Now let me turn to the proposed system. Under the proposed Order, any writer member would be permitted to elect to receive payments solely on the basis of current performance credits earned in the prior fiscal survey year, except that if the writers classified at 975 points—39,000 performance credits divided by 40 = 975—and above 975—currently the top approximately 100 writer members in ASCAP—vote in a special election to be held for that purpose, to withhold from themselves the current performance option, then the current performance option would be applicable only to the first 39,000 annual performance credits of an electing writer, or the lowest number of average performance credits of any writer from whom the option is withheld, if that lowest number should be higher than 39,000.

For credits earned in excess of such number, a writer electing the current performance option will be paid on the basis of the four-fund system. That is, such a writer would share in the 20% Current Performance Fund on the basis of all credits received by him; in addition, he would be given rankings in the other three funds as if his one-year total were a five-year average, but those rankings would then be reduced by 975 points; this is the value represented by the credits for [fol. 237o] which he would be paid on the current performance option basis.

Approximately the top 100 writer members will be given an opportunity to decide for themselves as a group, by a majority vote of such writers, to withhold the current performance option from these 100 writer members.

For the purpose of this vote, a majority shall require both (1) a majority of those writers who vote in such election and (2) writers who together hold a majority



of the total average performance credits of all those writers who vote in such election.

In the event that the top writers vote to withhold the current performance option from themselves, another such election to determine whether they wish to continue withholding the option may be called at the end of three years by a petition signed by either (1) 25 in number, or by 25% of such top writer members, the percentage to be computed on either a member or an average credit basis, or (2) by the Department of Justice.

The theory underlying this provision of the proposed Order is that the writers with the most performance credits in ASCAP should, if they wish, be permitted the opportunity to continue their present practice of receiving considerably less money per performance credit than do those writers whose works have received fewer performance credits. The result is that the amounts so withheld from the writers with the most performance credits are pro-rated among the other writer members with fewer performance credits, thereby appreciably benefiting the majority of the writer members, and thus helping to promote the Society and the songwriting profession as a whole.

[fol. 237p] Under the proposed Order, a writer would be permitted to elect the current performance option for any subsequent survey year.

But, having so elected, he would for bookkeeping reasons be initially bound to that option for two years. If he later returned to the four-fund system, and thereafter again chose the option within the next five years, he would then be bound to the current performance option for five years.

A writer member who elects the current performance option may thus return to the four-fund system. In that event, however, he receives no credit in the Membership Continuity Fund for the period of his current performance election in which his current performance credits did not exceed 39,000 or such higher number as already described.

For purposes of computations for the Average Performance and Recognized Works Performance Funds, a writer cancelling his current performance election will have his performance credits, if any, for the years next prior to his election credited as if they were received in the years immediately preceding his return to the four-fund system.

b. *The Four-Fund System.* For those writers who continue to receive payment on the four-fund system, several changes would be made in that plan.

Let me outline them as follows:

(1) The Current Performance Fund (20%) would continue in the same form as it is today.

(2) The Average Performance Fund (30%) would replace the present Sustained Performance Fund and would operate in essentially the same fashion, i.e., on the basis of the most recent five-year performance credit average of each writer member.

[fol. 237q] To meet the views of the Department of Justice, two significant changes would be made in that Fund, however: (1) writers would not be permitted to elect a ten-year rather than a five-year average, and (2) (a) classification increases based on the most recent available five-year averages would be spread over a two-year period and (b) decreases would be spread over a three-year period, rather than according to the complicated mathematical limitations on classification movements now in effect.

Please note the hypothetical examples set forth in the Appendix hereto which, although not part of the oral remarks, are furnished as a guide which members may find helpful in seeing how classification increases and decreases would be calculated under the new plan.

(3) The Availability Fund (30%) would be replaced by the Recognized Works Performance Fund, which would be distributed on the same basis as

the Average Performance Fund, except that payment out of this Fund would be limited to credits received by works performed at least four quarters after their first surveyed performance.

The basic theory underlying the Recognized Works Performance Fund is that songs become more valuable to the user as they demonstrate the durability of their public acceptance. It is firmly believed by the Board of Directors and counsel as a fundamental principle of ASCAP that those songs which are performed long after their initial "plug" period contribute more overall to the continued value of the Society's catalog than do brand new works that may be performed a comparable number of times during the same survey year.

[fol. 237r] Because of the special place of fond memories or pleasant recollections that well-known and established songs hold in the minds and hearts of an audience, it is believed that their value cannot be equated on a straight one-for-one performance basis with compositions that have not yet attained comparable recognition stature with listeners or viewers of all ages and different economic means.

Thus, time and again in the negotiations with the ASCAP licensees, it has been emphasized in one way or another that the key bargaining assets of the Society with the users, which their directors can utilize as they see fit, are its standard songs and established catalogs and their continued availability.

The Recognized Works Performance Fund would recognize this added contribution by compensating, in that Fund, only for performances of songs that had demonstrated a degree of sustained public recognition and demand.

Without this Fund, there would be no distinction in the credit awarded to different songs, except for the Weighting Rules, despite the very real differences in value to the user that exist between transitory "hits" and works of lasting public acceptance.

Of course, writers classified below 975, or those classified in 975 and above may elect in the special

election, to be paid on a 100% current performance basis. They may thus avoid being subject to the application of the Recognized Works Fund.

(4) The Membership Continuity Fund (20%) would replace the Accumulated Earnings Fund (20%). It would be distributed on the basis of (a) a member's continuous quarters of membership, not to exceed 42 years, and (b) the member's Average Performance Fund rating, rather than, as at present, [fol. 237s] on the basis of the average of his Sustained Performance and Availability ratings.

(5) Before any distributions are made to the writer members under the current performance option of the four-fund plan, up to 5% of the writers' distributable revenue can be deducted for the purpose of making awards for works of unique prestige value or for works substantially performed in media not surveyed by ASCAP.

Awards under this provision will be made by an independent panel of experts and will be announced by the Society to all writer members in advance of payment. Now, some members may dislike the publicity but, on the theory of the right of the public to know, it permits any member who believes that he has been overlooked or that the awards are inadequate or improper in any respect, to apprise the Society of his views.

The Department has agreed that the Writers' Distribution Formula which I have just outlined complies with the proposed Order.

The proposed Order itself requires that at least 20% be distributed on the basis of current performances and at least 30% on the basis of average performance credits.

The Order further requires, and I call your specific attention to the change in wording, that not more than 30% be distributed on the basis of performances of Recognized Works and not more than 20% on a basis which includes continuity of membership.

The over-all Writers' Distribution Formula, consisting of the inter-related Four Funds and the Current Performance Option, have been given the most serious consideration [fol. 237t] by your Board of Directors and counsel. It may not be amended by the Society itself without 30 days' prior written notice to the Department, and any amendments would have to conform to the proposed Order. Changes cannot be made in one fund without affecting the inter-related parts and consequently the rights of individual members. No proposed change can therefore be considered alone.

**B. PUBLISHERS' DISTRIBUTION FORMULA,  
PRESENT AND PROPOSED.**

Now let me turn to the Publishers' Distribution Formula.

1. *The Present System.* Let me take up first the present system. The publishers' distributable revenue is divided into three funds: (1) The Current Performance Fund (55%), (2) The Availability Fund (30%), and (3) The Seniority Fund (15%).

a. *The Current Performance Fund (55%).* The Current Performance Fund is distributed on the same basis as the Writers' Current Performance Fund, i.e., the number of current performance credits received by each publisher during the latest available fiscal survey year determines the extent of its participation.

b. *The Availability Fund (30%).* The Availability Fund is distributed on the basis of a five-year accumulation of performance credits attributable to performances of works that were picked up in the Society's survey two years prior to such performances, i.e., compositions that have demonstrated a substantial degree of durable public acceptance.

c. *The Seniority Fund (15%).* Participation in the Seniority Fund is determined by multiplying the number of performance credits earned by each publisher member during the latest available five fiscal survey [fol. 237u] years by the number of quarters that such publisher has been a member of ASCAP.



## 2. *The Proposed System.*

Now, let me explain the proposed Publisher's Distribution Formula.

a. *The Current Performance Option.* The publishers, like the writers, will also have the opportunity of electing to receive distributions solely on a current performance basis.

However, inasmuch as the publishers will lose their seniority ratings over a five-year period, and unlike the writers, will not have the right to elect a five-year average, in order to avoid sharp initial dislocations of income which many publishers have relied on in the past, this option will be graduated over a period of five years on the following basis:

- For the first applicable fiscal survey year, an electing publisher would receive 75% of the amount to which he would be entitled if all publishers were on a current performance basis. For the second year, 80%, and so on until after five years, i.e., in 1964, any publisher electing the current performance basis of distribution would be entitled to 100% of the amount he would get if every publisher were paid solely on a current performance basis.

Alternatively, a publisher can continue on the regular plan for several years and then move over to a current performance basis, at that time receiving whatever the applicable percentage may be for that year on the current performance side. Once, however, a publisher shifts to the current performance basis, he will continue to receive payment under that system.

b. *The Three-Fund System.* For those publishers preferring not to receive distribution solely on the basis [fol. 237v] of current performances, several significant changes will be made from the existing system:

(i) The Current Performance Fund (55%) will remain the same.

(ii) However, the Availability Fund (30%) will be replaced by the Recognized Works Performance Fund and payment therefrom will be on the basis



of credits earned during the preceding fiscal survey year, rather than during the five preceding years, by songs at least one year old—in terms of performance—rather than two years.

(iii) The Seniority Fund (15%) will be replaced by the Membership Continuity Fund. This Fund will be phased out at the rate of 3% a year, with a corresponding increase in the Current Performance Fund, so that after five years 70% of the money paid out under the regular plan will be on the basis of current performance credits and the remaining 30% will be paid out on the basis of Recognized Works.

### C. FOREIGN REVENUE.

I now turn to the question of foreign revenues.

The Department has questioned the present method of distributing the royalties which ASCAP receives from approximately 22 foreign societies.

It is the current practice of ASCAP to distribute Canadian, English and Swedish revenues on the basis of the respective reports received from those countries; these sources furnish ASCAP complete reports in usable form for distribution. All other foreign revenue is currently distributed on the basis of English and Swedish reports.

ASCAP has agreed that if the revenue from any foreign source exceeds \$200,000 per annum, and the reports furnished ASCAP allocate credit in reasonably identifiable form separately by compositions performed and indicate the members in interest, such revenue will be separately distributed on the basis of those reports. Other foreign revenue will be distributed on the basis of the most reliable information ASCAP has as to foreign performances generally.

ASCAP has received more than \$200,000 per annum from England since 1943, from France since 1952, from Canada since 1953, and from West Germany since 1955. The French and German reports are in usable form, however, only with respect to non-film performances. Accordingly, it has been agreed that French and German non-

In a non-feature use, a well-known song will generally be performed only with the specific intent of projecting the content, image or memory associated with that song into the format or storyline of the program. Thus, such a use is given a prominent place in the program throughout the period of its performance.

An unknown or relatively unknown composition, on the other hand, can be performed in a non-feature role with only passing or brief atmospheric effect on the audience. [fol. 237z] Under the proposed Order, the Weighting Rules applicable to credit for uses as themes, jingles, background, cue and bridge music would be substantially revised, as I shall describe later.

a. *The Qualifying Test.* A new, and we think sounder, test has been developed for determining which songs will qualify for more than minimum credit when used as non-feature music. For full credit when so used a song must

(a) have accumulated 20,000 *feature* performance credits, i.e., credits not earned for theme, jingle, background, cue or bridge uses, and (b) have earned 2,500 *feature* performance credits during the five most recent survey years, towards which number not more than 750 can be counted in one year.

The latter requirement would be reduced proportionately for songs with less than 5 years of performance credits. In addition, 25%, 50% and 75% credit will be awarded to partially qualifying songs when used as themes and 50% credit for partially qualifying songs when used as background music.

A "Theme" is defined as a musical work used as an identifying signature of a radio or television personality or of all or part of a radio or television program or series of programs. A musical work (other than a jingle) used in conjunction with a commercial announcement shall receive the same credit as a theme.

"Background Music" is defined as mood, atmosphere or thematic music performed as background to some non-musical subject matter being presented on a radio

or television program. A vocal or a visual instrumental rendition of a work on any medium shall not be regarded as background music regardless of the context in which performed.

[fol. 237aa] Thus, the new test has a double requirement: (1) the work must have attained a sufficient "hit" status at one time to indicate its audience recognition value and (2) it must have enjoyed some recent popularity, indicating that it is still alive in the minds of many listeners and will invoke response.

For works first performed before 1943, when the Society began to maintain adequate records of performance credits, the 20,000 feature credit requirement could be met if the work were listed in (1) the publication "Variety Music Cavalcade", published by Prentice-Hall in 1952, (2) as one of the "top ten" hits on the "Lucky Strike Hit Parade" or (3) as one of the "top ten" on the weekly lists of the most popular songs published in *Variety* or (4) *Billboard*.

"Variety Music Cavalcade", the "Lucky Strike Hit Parade", *Variety* and *Billboard* were selected for this purpose because, in the considered opinion of the Board of Directors and management of ASCAP, they represent the best available reference sources for ascertaining the status of works performed before 1943. Not including other references would probably be only a theoretical or academic omission because almost all "hit" songs performed before 1943 and which have received 2,500 feature performance credits in the five latest survey years are probably included in one of the lists referred to. Or, if not listed in any of them, they probably would have received 20,000 feature performance credits since 1943.

Between 1943 and 1955, the Society's records did not clearly indicate whether credits were for feature performances or for non-feature performances such as theme and background music. If a work first performed after January 1, 1943, appeared in any of the above-mentioned publications, it would be presumed that credits earned by it prior to October 1, 1955, were for [fol. 237bb] feature performances; if it has not so ap-

Society has surveyed performances by symphonic and concert licensees.

Starting January 1, 1943, dates of all performances were recorded and, when the local surveys started, performances on local radio and television were so noted. It was not until October 1, 1955, however, that the records of the Society indicate the various uses of a given performance, for example, feature use, theme, background, jingle, etc.

The records of ASCAP do not show which performances are "live" and which are recorded.

#### b. *Credit Provisions*

I turn to the credit provisions in the Weighting Formula:

(i) *Feature Performance*. All uses except those credited as themes, jingles, background music or cue and bridge music, as defined in Section A of the Weighting Rules, are described as "feature performances".

Each feature performance of a work, except public domain arrangements and certain serious works, [fol. 237ee] which I discuss later, will be awarded full credit, except that (a) each repeated use of the same work on a single program after the first one, will receive only one-tenth credit, with a maximum of two full credits for any single program and (b) credit will not be allowed for more than eight feature performances per quarter hour.

(ii) *Themes*. A "qualifying work", when used as a theme, will be awarded 100% credit, or 75% or 50% or 25% credit, depending upon its past history of feature performances, for all such uses within the first hour of any two-hour period, and one-tenth of the otherwise applicable credit for all additional such uses during the second hour.

A "non-qualifying" work used as a theme will receive 10% credit for all such uses within the first hour of any two-hour period and 1% credit for all additional such uses during the second hour.

Musical works, other than jingles, used in conjunction with a commercial announcement will receive the same credit as a theme.

(iii) *Background Music*. A qualifying work used as background music will receive full credit or 50% credit depending on its history of prior feature performances.

Non-qualifying works will receive 20% credit if they have been commercially published for general public distribution and sale, if commercial recordings have been made as "singles" for general public distribution and sale, and if five feature performances of the work have been recorded in the local radio sample survey in the five preceding fiscal survey years:

For each repeated use on a single program after the first one, one-tenth of the credit provided above [fol. 237ff] will be awarded, with a maximum of two times the credit awarded for the initial performance.

Other non-qualifying background music on each program will receive, for each three minutes' duration in the aggregate for that program, 20% credit; fractions of three minutes will be computed on the basis of 5% for each 45 seconds or major fraction thereof.

(iv) *Cue and Bridge Music*. Let me now turn to cue and bridge music.

"Cue Music" is defined as music used on a radio or television program to introduce, but not to identify, a personality or event thereon. The term "cue music" includes, but is not limited to, introductions, "play-ons", and "play-offs".

"Bridge Music" is defined as music used on a radio or television program as a connective link between segments or portions thereof.

A qualifying work used as cue or bridge music will receive 10% credit for all uses during the first hour of any two-hour period and 1% credit for all such uses in the second hour.



A non-qualifying work will receive 1% credit for all uses during the first hour and  $\frac{1}{10}$  of 1% credit for all such uses in the second hour.

(v) *Jingles*. I turn now to jingles.

A "Jingle" is defined as a musical message containing commercial advertising matter, where (a) the musical material was originally written for commercial advertising purposes or (b) the performance is of a musical work, originally written for other purposes, with the lyrics changed for commercial [fol. 237gg] advertising purposes with the permission of the ASCAP member or members in interest.

Unlike the present Weighting Rules, no distinction whatsoever shall be made in credit awarded to works used as commercial jingles. Jingles will each receive 1% credit for all uses during the first hour of a two-hour period of programming and  $\frac{1}{10}$  of 1% for all uses in the second hour.

(vi) *Copyrighted arrangements*. The credit provisions for copyrighted arrangements have been rewritten so as to permit from 10% to 100% credit, depending upon the amount of original new material, either lyric or melodic.

(vii) *Other Provisions*. Other provisions of the proposed Weighting Rules permit the Society to limit the credit that may be awarded to works performed on dramatic programs 15 minutes or less in duration, presented two or more times a week.

The Society will continue to give extra durational credit for surveyed works which require four minutes or more for a single, complete rendition thereof, and which in their original form were composed for a choral, symphonic or similar concert performance, including chamber music, when those works are actually performed for the periods of time specified.

A durational credit system was inaugurated in 1945 and assumed its present form in 1955 for local performances and in 1957 for network performances.

In addition, performances of concerts by symphony orchestras on national network sustaining programs



may be awarded credit equal to performances on a network of 50 stations. Works performed on all other radio network sustaining programs will receive credit when picked up in the local survey.

[fol. 237hh] ASCAP may also distribute to its members, for performances of their works in concert and symphony halls, amounts five times the amount of the license fees received from ASCAP's concert and symphony hall licensees.

• • • • •

That concludes the discussion of the Weighting Formula. But before leaving the subject of weighting, let me explain the difference between two documents which all members received.

One document, entitled "Weighting Rules", appears as Attachment C to the proposed Order itself. These general provisions govern what may be contained in any detailed weighting formula which the Society adopts, unless a revision of the Weighting Rules should be ordered by the Court.

The "Weighting Formula" which the members also received as a part of the same booklet, contains the detailed weighting provisions which the Department has agreed initially comply with requirements of the Weighting Rules.

The Weighting Formula may not be amended by the Society without 30 days' prior written notice to the Department, and any amendments would likewise have to conform to the Weighting Rules attached to the Order itself or to a Court-ordered revision thereof.

[fol. 237ii]

#### IV. VOTING.

Let us now turn to Section IV of the proposed Consent Order, which provides for the new voting formulae, and which would substantially change the present method of allocating votes.

##### A. PRESENT SYSTEM.

At present, each writer member has one vote for every \$20 of annual ASCAP income and each publisher member

has one vote for every \$500 of annual ASCAP income, with no limit on the number of votes held by any one member.

Elections for directors have been held once every two years.

Of the 12 writer members of the Board of Directors, one has been a Director since 1920, two were first elected in the 1930's, two in the 1940's, and the remaining seven in the 1950's, including two in 1957 and three in 1959.

There are 12 publisher directors. Two publishers have been represented on the Board of Directors since 1914, two since 1924, one since 1938, two since 1939, one since 1947, three since 1957 and one since 1959.

#### B. PROPOSED SYSTEM.

Under the proposed Consent Order, votes would be allocated solely on the basis of performance credits earned in the preceding fiscal survey year, rather than on dollar revenue. The votes would be computed in accordance with a diminishing returns formula under which a member would have to earn progressively more credits for each additional vote.

No member—writer or publisher—would be allowed more than 100 votes.

[fol. 237jj] The new voting rules provide other significant changes:

1. If at any time there is an increase of more than 10% in the percentage of total publisher votes held by the top ten publisher members and their affiliates, the publishers' voting formula must be revised to bring the votes of such publishers back within 10% of the amount which they would initially hold under the new voting formula.

The top ten publisher members and their affiliates would, according to the latest available figures, initially hold about 37% of the total publisher votes; thus, the maximum which could be held by any ten publishers, including their affiliates, would be about 41%.

For your information, the top 50 publishers out of a total of about 1400 publisher members would, according to the latest available figures, have 2,479 out of a total of

4,908 publisher votes, or 50½% of the total. Fourteen of these publishers are affiliated with others among the top 50, so that the foregoing statistics represent 36 separate publisher members and affiliates.

The new publishers' voting formula will reduce the voting strength of the top ten publishers and their affiliates from about 63% at present, to about 37% of the total publisher votes; it will also reduce the voting strength of the top 50 publisher members from about 78% at present, to about 50% of the total publisher votes.

The twelve publisher members of the Board of Directors, including affiliated publishers, would initially have about 1,505 out of a total of 4,908 publisher votes, or slightly over 30% of the total. This is a substantial reduction from 56% of the votes under the voting system now in effect. Under the new formula, of the 12 publisher members of the Board of Directors, including affiliated companies, one would have 424 votes, one would have 393 votes, one would have 254 votes, three would have between 98 and [fol. 237kk] 111 votes, three would have between 21 and 43 votes, and three would have between three and six votes.

Note: The above figures have been recomputed since my speech in Los Angeles on August 18, 1959 and the figures vary slightly from those there given.

2. In any election for the Board of Directors, 25 writer members may nominate an eligible person as a writer-director, and 25 publisher members may nominate an eligible person as a publisher director.

3. Any group of writer or publisher members representing 1/12th of all the writer or publisher votes, as the case may be, can elect one director by signing a petition in his support at least 90 days before the date of any scheduled directors' election.

In that event, the number of directors to be elected in the general election would be reduced by the number of directors elected by petition. Members who elect a director by signing such a petition naturally would be precluded from voting again in the general election.

It would take publishers with an estimated 409 votes to elect a publisher director under the above provision. This would require a varying number of publisher members. Thus, it would take 409 of the 628 publisher members who have only one vote each to elect a publisher director. On the other hand, there are four publisher members, not presently represented on the Board of Directors, who together have enough votes to elect a member of the Board of Directors under this proposal.

On the writers' side, it is estimated that there will be in excess of 15,000 eligible votes under the new system. Thus, it will take about 1,300 votes to elect a writer member of the Board by petition.

[fol. 237ll] 4. An election of directors must be held within one year after the effective date of the proposed Order, probably early in 1961. All directors shall be elected at the same time, except for those elected by petition, and the number of directors shall not be less than 24.

The voting provisions contained in the proposed Order attempt to give fair recognition to the fact that the more than 6,000 members of ASCAP make varying contributions to the value of the available ASCAP repertory.

At the same time, however, these provisions would substantially broaden the base of present voting strength. As a result, the members with the most popular catalogs would receive a far smaller percentage of the total votes than the percentage of total ASCAP performance credits attributable to their catalogs.

Other provisions that I have mentioned attempt to give minority groups an opportunity to get together to nominate or elect a director to represent their views on the Board of Directors.

## V. INFORMATION AND COMPLAINT PROCEDURES.

I now turn to the provisions respecting information and complaint procedures.

### A. ACCESS TO SOCIETY'S RECORDS.

Under the proposed Order, ASCAP would be required to make available for inspection by any member a list of

the mailing addresses of all members, except those members who refuse to have their addresses revealed, in which event ASCAP will forward, unopened, any mail addressed to that member in care of ASCAP.

Within nine months after the end of each survey year, ASCAP would prepare alphabetical lists of all the compositions that received performance credits during that [fol. 237mm] year, indicating thereon the number of credits received by each.

In addition, the Society would maintain records showing the number of feature performance credits received during the five preceding fiscal survey years by all works that received credit during the preceding year as a theme or as background, cue or bridge music.

Any member or his authorized agent will be permitted to inspect such lists and such records with respect to his own compositions. Other portions of such lists and records shall be available for inspection by any member or his authorized agent to the extent that inspection is sought *in good faith* in connection with any financial interest of such member *as a member*, as opposed to his personal or business interests apart from his membership in ASCAP. In this context "good faith" would embrace any legitimate interest of a member in respect to his relations with ASCAP so long as that interest was not inimical to the welfare of the Society.

All other records of the Society relating to distribution shall be open for inspection by any member or his authorized agent for *good cause*, which really means any sound, legitimate reason, provided that such member shall have been a member of ASCAP for at least one year prior to his request for inspection.

The object of these provisions is, of course, to safeguard each member's legitimate right to information affecting his participation in the ASCAP royalties, while at the same time preserving the privacy of other members' affairs from unnecessary inquiry. It would be impossible to list the many and varying instances or the facts under which inspection would be either proper or improper.

Hence, the concepts of "good faith" and "good cause" were adopted because they have been found both desirable



and workable in other similar areas. They have frequently been used as general statutory language governing the [fol. 23700] right of inspection and have worked well. They are not just legal gobbledygook words.

#### B. THE COMPLAINT PROCEDURE.

Under the proposed Consent Order, ASCAP would be required to establish a Special Board, elected in the same manner as the members of the Board of Directors, to entertain complaints by a member relating (1) to the distribution of ASCAP revenue to such member or (2) to any rule or regulation of the Society directly affecting distribution of the Society's revenues to such member. Currently, all such complaints are initially heard by the writers' or publishers' Classification Committees.

Under the proposed Order, a complaint would have to be filed within nine months of the receipt by a member of the annual statement or the rule or regulation on which his complaint is based.

Each member would have a direct right of appeal from any decision made by the Special Board to an impartial panel of the American Arbitration Association.

#### VI. ADMISSION TO MEMBERSHIP.

The last subject-matter of the proposed Consent Order deals with admission to membership.

Any person whose application for membership has previously been denied between March 14, 1950, the date of the Consent Decree, and the effective date of the proposed Order, and who reapplies for ASCAP membership, will be admitted retroactively to the date of his initial application or 1950, whichever is later, if (1) he was eligible for membership at that date and (2) if he did not subsequently license, through another performing rights organization, the works upon which his qualification for membership is based.

[fol. 237pp] Assuming he qualifies for retroactive admission, this retroactive admission, in many instances, will be only for the purpose of seniority ranking.



Under the existing Consent Decree, ASCAP is not permitted to limit its membership by refusing admission to duly qualified applicants. The proposed Order makes no change in this respect.

I am sure you will be delighted to know that this concludes my detailed discussion of the substantive provisions of the proposed Consent Order.

#### VII. GENERAL REMARKS.

Having tried your patience thus far, let me make some general remarks.

If the proposed Order and related documents are approved by Judge Ryan this fall, thereafter certain portions of the Articles of Association relative, for example, to voting and grievance procedures, will have to be submitted to the general membership of ASCAP for approval.

If the required membership approval is given, ASCAP will file with the Court a statement to that effect and the date of filing that statement will be the effective date of the Consent Order.

If the membership does not approve the necessary changes in the articles within the allowed time, which is three months, the Order will be vacated without prejudice to either party. In that event, the issues raised by the Department of Justice would have to be litigated.

This would mean not only great expense but complete uncertainty as to the result and its timing. In any event, in the ensuing period of litigation, ASCAP's position in [fol. 237qq] the industry would be jeopardized and its negotiations with its licensees would be seriously prejudiced.

Some members may feel that the changes which are proposed in the plan before you would adversely affect rights which they now have under the present system where, for example, they may have chosen the ten-year basis in the Sustained Performance Fund whereas it is proposed that everyone not electing the current performance option be put on a five-year basis in the Average Performance and Recognized Works Performance Funds.

Let me remind you that ASCAP and the members are operating under the 1950 decree of the Court. At the start I read you Section XVII of that decree, which permits the Department of Justice to apply for further relief and the Court retains jurisdiction so it can grant further relief.

All rights of members in the distribution of revenue are subject to that basic document and to the Society's Articles of Association. Members' rights thus are not absolute rights.

If the proposed Order is approved by the Court and the necessary changes in the Articles of Association are approved by the membership, then the members will have the assurance of knowing what they will receive, under a plan which I believe is fair.

Unless circumstances change materially, you can rest assured the proposed plan will operate for the reasonably foreseeable future. But if there are completely new and different facts, the Department of Justice or the Court might call for new hearings.

If the proposed Order is not approved, the members will have no assurance of what the future holds in store, and if the matter is litigated, the result may well be far less attractive than what is being proposed today.

[fol. 237rr] In order to keep my remarks within reasonable limits, I have not discussed some provisions in the Consent Order that speak for themselves and need no explanation, such as, for example, the number of performance credits needed for each vote.

I heartily recommend, however, that each member read carefully the proposed Consent Order and the documents filed therewith, as well as my explanatory memorandum sent to each member on July 21, 1959.

I further urge all members to bring any questions remaining unanswered to the attention of the Society well in advance of the hearing in October. We will do our best to answer you.

As you can see, I sincerely believe that the provisions contained in the proposed Order and related documents, if approved by the Court, will serve the best interests of the entire Society and the membership at large.

In an organization with relationships as complex as those here present, someone will always feel that certain rules or regulations may work to his detriment, or that they ought to be changed in some respect which, at first, may seem to be very minor.

However, the proposed Consent Order and the related documents are carefully integrated parts—the warp and woof—of a single fabric of relationships.

Any one change may thus disturb the balance of these relationships. It may also require several further changes in order to preserve certain equitable principles sought to be served by the Consent Order, to which changes other members may not agree.

Thus, given the difficult problems posed by the Department of Justice, I think that the solutions represented by these provisions are on the whole fair and equitable.

[fol. 237as] I also think the removal of the threat of major antitrust litigation will permit the Society to function even more effectively and more harmoniously in the future than it has to date.

By accepting this decree we know that ASCAP will be kept alive as a continuing and united Society working in the best interests of all of its members.

In a complex situation such as this, compromise to some extent is always necessary. I have advised the Board that in my judgment a more satisfactory solution from the point of view of the Society's best interests probably could not be attained through litigation, although this is always a possibility.

Therefore, the Board of Directors, after extended investigation and the most serious discussion, and with the advice of counsel, has unanimously approved the proposed Order and it unanimously recommends that the necessary amendments to the Articles of Association be approved by the general membership.

In my negotiations with the Department of Justice and in my advice to the Board of Directors with respect to this proposed Consent Order, I have tried to represent the interests of all of the members of the Society, and to consider and balance their different interests.

I wish to express at this time to President Adams, his predecessor Paul Cunningham, Herman Finkelstein, general attorney of the Society, and to the Board of Directors and to the Society generally, my pleasure in serving the Society in this most interesting and complex matter.

I also wish to thank the staff, the Society's general counsel, Messrs. Schwartz and Froehlich, and the Society's Washington counsel, Messrs. Cox, Langford, Stoddard and Cutler, for their unfailing co-operation.

Thank you very much.

[fol. 237tt]

## APPENDIX

### HYPOTHETICAL EXAMPLES PREPARED TO GUIDE MEMBERS IN CALCULATING CLASSIFICATION INCREASES AND DECREASES IN THE AVERAGE PERFORMANCE AND RECOGNIZED WORKS PERFORMANCE FUNDS.

The following examples illustrate how the provisions for classification increases and decreases in the Average Performance and Recognized Works Performance Funds would operate in four hypothetical situations.

The column "Actual Performance Credit Average" shows the classification points which the hypothetical member would have, based on his assumed five-year average performance credits, if there were no limitations on classification increases or decreases.

The column "Classification" shows the point classification assigned to the hypothetical member in the Sustained Performance Fund in 1958, and the point classification that would be assigned to him in the Average Performance Fund in 1959 and thereafter, based upon his assumed latest five-year average of performance credits and taking into account the limitations on classification increases and decreases.

The column "Computation" shows how the new point classification would be computed each year on the facts assumed in the examples.

Each member has his own records and knows his own actual facts, which presumably will be different from the facts assumed in the examples. The hypothetical examples may facilitate calculation by an individual member of how

the proposed plan would affect him. They are not actual cases.

[fol. 237uu]

Example A	Actual Performance Credit Average	Classification	Computation
1958		450*	
1959	350	425	$450 - 25 = 425$
1960	350	400	$425 - 25 = 400$
1961	350	375	$400 - 25 = 375$
1962	350	350	$375 - 25 = 350$

EXPLANATION: A point decrease between a 1958 Sustained Performance classification and a 1959 Average Performance classification (or between a 1958 Availability classification and a 1959 Recognized Works Performance classification) would be spread evenly over four years.

Example B	Actual Performance Credit Average	Classification	Computation
1958		450*	
1959	450	450	
1960	300	400	$450 - 50 = 400$
1961	350	375	$400 - 50 + 25 = 375$
1962	350	350	$375 - 50 + 25 = 350$

EXPLANATION: Except for decreases between 1958 and 1959 classifications, all point decreases are spread evenly over three years. Except for increases entitling a writer member to a classification of 1,000 or above, all point increases are spread evenly over two years.

\* 1958 Sustained Performance (or Availability) classification.

[fol. 237vv]

Example C	Actual Performance Credit Average	Computation	Classification
1958		450*	
1959	350	425	$450 - 25 = 425$
1960	400	425	$425 - 25 + 25 = 425$
1961	450	450	$425 - 25 + 25$ $+ 25 = 450$
1962	500	475	$450 - 25 + 25$ $+ 25 = 475$
1963	500	500	$475 + 25 = 500$

EXPLANATION: Point increase and decrease "carry forwards" are applied cumulatively and concurrently. For example, a portion of a 1959 decrease is applied at the same time as a portion of a 1960 increase.

Example D	Actual Performance Credit Average	Classification	Computation
1958		1,000*	
1959	1,000	1,000	
1960	900	950	$975 - 25 = 950$
1961	900	925	$950 - 25 = 925$
1962	900	900	$925 - 25 = 900$
1963	1,000	1,000	(No limitation)

EXPLANATION: There are no limitations on increases to Class 1,000 or above or on decreases from Class 1,000 or above to Class 975.

\* 1958 Sustained Performance (or Availability) classification.

Note: The above examples apply equally to the Average Performance and Recognized Works Performance Funds. The single difference between the computations for the two funds is that the performance credit average used for classification in the Recognized Works Performance Fund includes only credits attributable to surveyed performances occurring after the expiration of four quarters commencing with the quarter in which a performance of any given work is first recorded in the Society's survey.



[fol. 238]

## EXHIBIT "C" TO AFFIDAVIT

MURRAY HILL 8-8800

CABLE ADDRESS: ASCAP, NEW YORK

AMERICAN SOCIETY OF COMPOSERS,  
AUTHORS AND PUBLISHERS575 MADISON AVENUE  
NEW YORK 22, N. Y.

(Emblem)

September 30th, 1959

No. .....7437

## To All Members of the Society:

The members have already been advised that a new survey of performances has been designed by Joel Dean Associates, and Mr. Arthur Dean's remarks at the West Coast and New York meetings, which have been printed and sent to all members, generally outline the new survey plan.

Starting October 1, 1959, the Society's survey will be conducted according to the new design of Joel Dean Associates. In about a week's time we plan to send to all members a further memorandum outlining the basic procedures of the survey.

For purposes of distribution to writer members commencing with the October 1959 distribution, the Writers' Classification Committee has created three new classes above Class 1000, namely, Classes 1025, 1075 and 1400.

The following table lists the Classes 975 and above, including the three new classes, and gives the number of average performance credits needed for each class.

Class	Credits		
975	39,000	to	49,999
1000	50,000	"	62,499
1025	62,500	"	74,999
1050	75,000	"	99,999
1075	100,000	"	124,999
1100	125,000	"	199,999
1200	200,000	"	299,999
1300	300,000	"	449,999
1400	450,000	"	599,999
1500	over 600,000		

Sincerely yours,

/s/ STANLEY ADAMS  
Stanley Adams,  
President.

SA:AW

[fol. 239]

EXHIBIT "D" TO AFFIDAVIT

Murray Hill 8-8800 Cable Address: ASCAP, New York

AMERICAN SOCIETY OF COMPOSERS,  
AUTHORS AND PUBLISHERS

575 Madison Avenue  
New York 22, New York

STANLEY ADAMS  
President

October 5, 1959

*To All Members of the Society:*

On September 30, 1959, I advised the membership that the Society's survey would be conducted, starting October 1, 1959, according to the new design of Joel Dean Associates.

Joel Dean Associates have prepared a memorandum outlining the basic procedures of the survey, and a copy of that memorandum is enclosed for the information of the members.

Sincerely yours,

STANLEY ADAMS, *President*

[fol. 239a]

## JOEL DEAN ASSOCIATES

*Economic and Management Counsel*

14 Hopke Avenue

Hastings-on-Hudson, N.Y.

\* Hastings-on-Hudson, N.Y.

Chicago, Illinois

MEMORANDUM FOR THE INFORMATION  
OF MEMBERS OF ASCAP, WITH RESPECT  
TO THE NEW SURVEY PUT INTO EFFECT  
ON OCTOBER 1, 1959

Joel Dean Associates was retained by Mr. Arthur H. Dean, of Sullivan & Cromwell, special counsel for ASCAP, to redesign the ASCAP survey of playings of musical compositions of its members.

Today, ASCAP takes a census of all playings on the ABC, CBS and NBC radio and television networks, as well as all playings by concert and symphony hall licensees. In addition, ASCAP makes a sample survey of local radio and local television playings. No survey is currently made of other licensees, such as hotels, restaurants, nightclubs, and background music services. In the aggregate these other licensees account for approximately 11 percent of the Society's domestic receipts.

It is obvious that it is in the interest of all of the members that the survey be designed to be as accurate as possible. On the other hand, it is equally obvious that survey costs reduce ASCAP revenue available for member distribution, and hence limit the feasible size of the survey.

The Board of Directors of ASCAP authorized us to design a survey which would improve the accuracy of measurement of the playings of the various compositions in the ASCAP catalogue and of their relative values. We recommended, and the Board of Directors approved, a survey which would substantially increase survey costs. The major causes of this cost increase are (1) a substantial increase in the size of the local radio sample and (2) sampling on a scientifically random basis.

[fol. 239b]

## NON-RADIO-TELEVISION LICENSEES

The present census of music played in concert and symphony halls will be continued. Experimental surveys of hotels, restaurants, nightclubs, etc. and background music services will be undertaken in an attempt to determine:

1. Whether there is any substantial difference in the identity and in the frequency of playing of compositions between (a) hotels, restaurants, nightclubs, etc., or background music services, on the one hand, and (b) radio and television, on the other hand; and

2. Whether it is economically feasible to conduct a survey of hotels, restaurants, nightclubs, etc., or a survey of background music services, i.e., whether the increased accuracy which such surveys would provide would justify the cost of adequate separate surveys of performances by these licensees, as opposed to the present practice of distributing the income from such licensees on the basis of radio and television performances.

An expenditure of \$35,000 has been authorized for these two experimental surveys.

The remainder of this memorandum will be addressed to the survey of radio and television playings which are the major sources of ASCAP receipts.

## PERFORMANCE CREDIT ALLOCATION AMONG MEDIA

The provisions of the ASCAP distribution system for average performance credits and for the "qualifying test" for non-feature uses of music make it desirable for the new system to produce an approximately constant total number of credits. The survey is thus planned to produce an aggregate of about 25 million performance credits per year on the writers' side and the same number on the publishers' side.

[fol. 239c] Total credits will be divided among the four media—network radio, local radio, network television and local television—in proportion to their dollar contribution

to ASCAP receipts. The approximate distribution of performance credits among media will be as follows:

Network Television	41-44%	(10.25-11.0 million credits)
Local Television	16-19%	( 4.00- 4.75 million credits)
All Television	<u>60.5%*</u>	(15.12 million credits)
Network Radio	4-6%	( 1.00- 1.50 million credits)
Local Radio	34-36%	( 8.50- 9.00 million credits)
All Radio	<u>39.5%*</u>	(9.88 million credits)

\* Distribution of credits based on 1958 ASCAP receipts.

These percentage figures take into account, as provided in Section II of the proposed Consent Order, "the revenue received from affiliated station announcements adjacent to and reasonably attributable to network programs carried by the affiliate." The percentages, and the resultant allocation of credits, will be reviewed and revised periodically to conform with any change in relative contributions of media to ASCAP receipts.

In the event that playings by licensees covered by the experimental surveys are included in the final survey, the above estimates of the distribution of performance credits will be adjusted to take into account the playings covered by the experimental surveys.

#### THE NETWORK RADIO AND TELEVISION SURVEY

##### PERFORMANCE CREDITS WITHIN NETWORK RADIO AND TELEVISION

Within each of the media, the same principle will be applied as was used in assigning total credits to the various media. Thus, the number of performance credits will vary with the amount of ASCAP receipts attributable to the network hookup on which the playing occurs.

##### NETWORK TELEVISION

ASCAP will continue to take a census of all playings on the NBC, CBS and ABC networks. This will be done by

Sworn to before me this 16th day of October, 1959.

Mary D. Devlin, Notary Public, State of New York, Residing in New York, New York County Clerk's No. 31-0939800, Certificate filed in New York County Clerk's Office, Commission Expires March 30, 1961.

[fol. 249]

EXHIBIT A TO AFFIDAVIT

Murray Hill 8-8800 Cable Address: ASCAP, New York

AMERICAN SOCIETY OF COMPOSERS,  
AUTHORS AND PUBLISHERS  
575 Madison Avenue  
New York 22, New York

STANLEY ADAMS  
President

October 9, 1959

*To All Members of the Society:*

Attached is a memorandum of Mr. Arthur H. Dean with respect to an amendment to the proposed Weighting Formula which was previously sent to the members together with the proposed Consent Order to be presented to Chief Judge Ryan on October 19, 1959. At Mr. Dean's request, a copy of this memorandum is being sent to all members of the Society.

Sincerely yours,

STANLEY ADAMS,  
President

[fol. 249a]

October 9, 1959

MEMORANDUM WITH RESPECT TO AN ADDITION TO THE  
PROPOSED WEIGHTING FORMULA

Each of the members has previously received a copy of the proposed Consent Order and Attachments A, B and C thereto, together with a copy of the proposed new Weighting Formula.



use of logs furnished by the networks, which ASCAP can check by means of the reference tapes it takes of network programs.

For convenience, groupings were used to determine the relative weight to be given for hookups of varying numbers of stations. Research indicates the following relative values for hookups of various sizes:

Number of Stations	Relative Weight of Playing
1- 30	.333
31- 75	.577
76-105	.888
106-139	1.000
140-185	1.377
186 and over	1.599

The above groupings were established in order to avoid unnecessary administrative complexity and because it is easier to establish reliable weights for station groups than to attempt finer distinctions in value, for example, the difference in value between a 58-station hookup and a 59-station hookup.

We examined each of the three major television networks separately (NBC, CBS and ABC), and concluded that the differences among the networks were not so great as to justify a different set of values for each network. However, the network television relationship will be reviewed [fol. 239e] periodically so that separate values for the different networks can be established if it becomes desirable to do so.

It is impossible to forecast accurately (i) the total number of playings of musical compositions on network television for the ensuing year, (ii) how many of these playings will be on hookups of 1 to 30 stations, or 31 to 75 stations, etc., and (iii) the number of performance credits which the playings will represent, in view of the fact that certain uses (such as jingles or the use of non-qualifying songs as theme or background music) receive fractional credit. However, for the purposes of this explanation, we have made what seem to be the most reasonable assumptions at the moment.

The members will note that the proposed Weighting Formula provides a credit limit of eight feature performances per quarter hour (see Section (B)(2)). It also contains limitations of credit for multiple themes during any quarter hour period (see Section (C)(2)(d)).

During our discussions with the Department of Justice, we discussed the desirability of a similar limitation on the number of use credits that should be allotted per quarter hour of programming for works performed as background music. In drafting the documents, it was provided in Attachment C to the proposed Consent Order (Weighting Rules) that ASCAP could promulgate rules limiting the credit to be awarded to aggregate performances of all works on a single program or during a period of programming (Section (D)).

The Department of Justice suggested that ASCAP set a limit of four use credits for qualifying works\* and works described in the last sentence of Section (C)(3)(b) of the Weighting Formula\*\* performed as background music per each quarter hour of programming. As the proposal seemed reasonable to ASCAP, we joined with the Department of Justice in an application to the Court to amend the proposed Weighting Formula in that respect.

Attached hereto is a copy of the order of Chief Judge Sylvester J. Ryan permitting such amendment.

Arthur H. Dean

\* See Section (C)(1) of the proposed Weighting Formula.

\*\* Works which have been commercially published for general public distribution and sale, of which a commercial recording has been made as a "single" for general public distribution and sale, and five feature playings of which have been recorded in the Society's local radio sample survey during the five preceding fiscal survey years.

We have assumed that 44,000 is the number of annual playings on network television of ASCAP works entitled to full credit (converting less than full credit uses by, for example, counting five 20% fractional credit uses as one full credit playing). We have further assumed that the average number of stations hooked into a network program is in the 106-139 station class. On these assumptions, the average multiplier for a television playing would be 242.

$$\frac{10.63 \text{ million network television credits}^*}{44,000 \text{ full credit playings} \times 1.00 \text{ hookup weight}} = 242$$

The multiplier will be lower than this for playings on station hookups in classes below the 106-139 station class and higher than this for playings on station hookups in classes above the 106-139 station class. Thus, a playing on a hookup of between 1 and 30 stations would get 81 credits ( $242 \times .333$ ), a playing on a hookup of 186 or more stations would get 387 credits ( $242 \times 1.599$ ), etc.

These numbers are not final because we are continuing our effort to make the best possible forecast of the total [fol. 239f] number of playings on network television and their distribution by station groupings. The final multipliers will reflect experience gained from the results of the new survey and therefore may vary from the foregoing examples.

#### NETWORK RADIO

ASCAP will continue to take a census of all playings on commercial programs on the NBC and CBS radio networks. This will be done by the use of logs furnished by the networks, which ASCAP can check by means of reference tapes it takes of network programs.

A census of playings on other networks is not justified because the expense would be out of proportion to the ASCAP receipts from these sources. Playings on these other networks will be covered by the local radio sample.

\* See table, p. 3.

Radio network sustaining programs will not be covered by the census of radio network playings because accurate information is not available on the number of stations which carry radio network sustaining programs. These programs will be covered by the local survey of the stations carrying the sustaining programs.

As with network television, there will be groupings for different sizes of radio network hookups. Research indicates the following relative values for hookups of various sizes:

Number of Stations	Relative Weight of a Playing
1- 30	.476
31- 64	.551
65- 98	.700
99-132	.850
133-166	1.000
167 and over	1.149

[fol. 239g] We have assumed that 21,000 per year is the number of playings on the NBC and CBS radio networks of ASCAP works entitled to full credit (converting less than full credit uses by, for example, counting five 20% fractional credit uses as one full credit playing). We have further assumed that the average number of stations hooked into a network program is in the 133-166 station class. On these assumptions, the average multiplier for a network radio playing would be 60.

$$\frac{1.25 \text{ million network radio credits}^*}{21,000 \text{ full credit playings} \times 1.00 \text{ hookup weight}} = 60$$

A playing on a hookup of between 31 and 64 stations would receive 33 credits ( $60 \times .551$ ); a playing on a hookup of 167 or more stations would receive 69 credits ( $60 \times 1.149$ ), etc.

Again these numbers are not final because we are continuing our effort to make the best possible forecast of the total number of playings on network radio and their dis-

\* See table, p. 3.

tribution by station groupings. The final multipliers will reflect experience gained from the results of the new survey and therefore may vary from the foregoing examples.

#### THE SAMPLE SURVEY OF LOCAL RADIO AND TELEVISION

Substantial changes are being made in the survey of local radio and television playings, in order to permit an income distribution to the Society's members on the basis of a scientific sample of playings and a proper allocation of credits in accord with ASCAP receipts from the station or group of stations from which the playings emanate.

#### [fol. 239h] SCIENTIFIC SAMPLING

A probability sample has been designed which can make efficient use of the principle of scientific random sampling. Its main characteristics are the following:

1. The radio sample has been considerably enlarged in order to increase the accuracy of measurement of playings.

2. The coverage of both the radio and television samples has been made more complete and representative.

- a. More licensees will be sampled.

- b. The different geographic areas in the country will be represented in the sample.

- c. Within geographic regions, communities with varying economic characteristics will be represented.

- d. Different times of day, days of the week, and weeks of the year will be represented in the sample.

3. The basic method of selection applied to all parts of the sample is scientific random sampling in order to achieve results of known reliability.

4. Because sampling is scientifically random, it is possible to stratify or classify licensees into sampling

groups. These groupings can be used to obtain information which will make it possible to vary systematically the proportions sampled in order to get maximum reliability per dollar of expenditure.

### SAMPLE SIZE

In a single year there are many million playings on local radio and television of the compositions of ASCAP members. To produce a better measurement of playings, the size of the local radio sample has been enlarged.

[fol. 239] The local radio sample upon which credit allocation will be based will comprise approximately 52,200 hours of programming (17,400 3-hour time units or 8,700 6-hour time units). The local television sample upon which credit allocation will be based will comprise approximately 30,600 hours of programming (10,200 3-hour time units or 5,100 6-hour time units).

The samples will be obtained from the nine geographic regions defined by the United States Bureau of the Census. Distribution of the sample among these regions, based on the distribution of ASCAP revenue from local radio and television stations, respectively, is as follows:

	Local Radio	Local Television
New England	6.3%	5.6%
Middle Atlantic	16.9	19.1
East North Central	20.0	21.4
West North Central	10.3	9.7
South Atlantic	14.9	12.9
East South Central	6.5	4.8
West South Central	9.8	10.3
Mountain	4.9	3.7
Pacific	10.4	12.6
(Puerto Rico)	•	•

• Less than 1%

It is planned to review the size of these samples periodically as we gain more knowledge and experience. The operation of the new survey will provide additional knowl-



edge of processing costs and of variations in the compositions played on network and local radio and television. This knowledge may indicate ways to get greater accuracy for the same expenditure, *e.g.*, by expanding the sample in some sectors and contracting it in others.

#### [fol. 239] SAMPLE COVERAGE

In both the local radio and local television surveys, more licensees will be surveyed to insure representativeness.

Performances of compositions in the ASCAP catalogue occur throughout every town and city in the United States and throughout every day in the year. Because there is a chance that musical performances vary among media, for example, local radio vs. local television, separate sample plans have been constructed for local radio and for local television. Similarly, because musical performances may differ by geographic regions, every section of the country is to be represented in order to take account of these possible variations. Within geographic regions there will be scientific random sampling of licensees by size groups (as measured by their ASCAP license fees) to ensure further the representativeness of the sample. Because of possible variations in performances among time periods, different hours of the day, days of the week, and weeks of the year will be represented in the sample.

#### SCIENTIFIC RANDOM SAMPLING

In all segments of the sample, *i.e.*, by media classes, by geographic area and by time period, the method of selection will be scientific random sampling. Randomness in this context refers to the process by which a sample is drawn. The ASCAP probability samples, by means of scientifically controlled selection that eliminates discretion in the drawing of the sample, will produce a fair representation of the relative frequency of the playings of compositions of the respective ASCAP members.

#### SAMPLE RELIABILITY

Because sampling will be scientifically random, the sample estimates will have a known reliability. With this known

[fol. 252]

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

PLEADING IN INTERVENTION

Applicants Sam Fox Publishing Company, Inc., Movietone Music Corp., Pleasant Music Publishing Corp., and Jefferson Music Company, Inc., by their attorneys, allege:

\* 1. Applicant Sam Fox Publishing Company, Inc. has been a publisher member of the American Society of Composers, Authors and Publishers (hereafter referred to as ASCAP) since 1924, and is a charter standard publisher thereof. Applicant Movietone Music Corporation has been a publisher member of ASCAP since 1932. Applicant Pleasant Music Publishing Corporation has been a publisher member of ASCAP since 1941. Applicant Jefferson Music Company, Inc. has been a publisher member of ASCAP since 1945.

2. The instant proceeding in the above-titled action was commenced upon the motion of the plaintiff United States to have the Court review and approve a further amended consent final judgment, that has been agreed to by plaintiff and the Board of Directors of ASCAP, which would modify certain provisions of the existing decree herein entered by the Court on March 14, 1950. Among the provisions of the 1950 decree which would be modified by the further amended consent final judgment (hereafter referred to as the "proposed order") are §§ XI and XIII, which provide:

[fol. 253]

X

"Defendant ASCAP is hereby ordered and directed to distribute to its members the monies received by licensing rights of public performance on a basis which gives primary consideration to the performance of the compositions of the members as indicated by objective surveys of performances (excluding those licensed by the member directly) periodically made by or for ASCAP."

reliability, frequency of the random sampling in each part [fol. 239k] of the sample can be varied systematically to get the best possible measurements from a given outlay on the survey.

Of course, no one sample is likely to show the exact proportions of the compositions of a particular member. However, over time and with the drawing of successive samples, sampling errors will tend to cancel out because these errors are solely the product of chance.

### SAMPLING FREQUENCY

The frequency with which a station or group of stations is sampled is related to the license fees it pays to ASCAP. Among the nine geographic regions of the country, sampling will be most frequent in those regions where stations contribute the largest amounts to ASCAP receipts. For example, twice as many samples will be taken from radio licensees in the West South Central region as from radio licensees in the Mountain region because West South Central radio licensees pay ASCAP twice as much as radio licensees in the Mountain region.

Within geographic regions the same principle is followed. In each of the nine geographic regions listed previously, stations have been classified into groups on the basis of certain economic characteristics of the communities in which the stations are located. Relative frequency of sampling among these communities is again tied to the contribution to ASCAP receipts from the stations in each of these communities. For example, in the West South Central region, radio licensees in metropolitan communities yield about 1.6 times the receipts to ASCAP of radio licensees in non-metropolitan communities and hence about 1.6 times as many samples will be taken in the metropolitan communities.

This sampling procedure is followed within the groups of communities in each geographic region. In each grouping, stations have been classified on the basis of their [fol. 239l] annual ASCAP license fees. In metropolitan communities in the West South Central region, the 40 radio stations which each pay ASCAP an annual license fee

## XIII

"In order to insure a democratic administration of the affairs of defendant ASCAP, and to assure its members an opportunity to protect their rights through fair and impartial hearings based on adequate information, defendant ASCAP is hereby ordered and directed to provide in its Articles of Association:

"(A) That the members of the Board of Directors shall be elected by a membership vote in which all author, composer and publisher members shall have the right to vote for their respective representatives to serve on the Board of Directors. Due weight may be given to the classification of the member within ASCAP in determining the number of votes each member may cast for the election of directors. Elections for the entire membership of the Board of Directors shall take place annually or every two years. The Board of Directors shall, as far as practicable, give representation to writer members and publisher members with different participations in ASCAP's revenue distribution;

"(B) That the general basis of member classification for voting and revenue distribution purposes shall be set forth in writing and shall be made available to any member upon request;

"(C) That any member may appeal from the final determination of his classification by any ASCAP committee or board to an impartial arbiter or panel;

"(D) That records be maintained by the officers, committees, or boards of ASCAP, and the impartial arbiters or panels referred to in Subsection (C) of this Section dealing with the classification of members and distribution of revenues, which will adequately apprise the respective members of the determinations made and actions taken by such officers, committees and boards of ASCAP, and arbiter or panels as to such members and the basis therefor."

3. The proposed order deals with six important phases of ASCAP's internal operations and the relationship of

of \$10,000 or less yield ASCAP, in the aggregate, about three times the aggregate revenue of the 10 stations in these same communities which each pay ASCAP an annual license fee of over \$10,000. Hence, in the aggregate, three times as many samples will be taken of the 409 stations in the \$10,000 and under group as of the 10 stations in the over \$10,000 group.

As provided in Section II of the proposed Consent Order, the Society will endeavor to obtain logs from local station licensees to the extent deemed necessary (1) to reduce non-identification of playings picked up by the sample tapes and to supplement the survey of playings where identification is difficult, *e.g.*, foreign language stations, good music stations and background music stations, and (2) to test and correct the accuracy of the surveys made by means of tape recordings.

#### PERFORMANCE CREDITS WITHIN LOCAL MEDIA

For purposes of sampling efficiency, the station groupings within communities have been made relatively broad. However, a finer grouping of stations by revenue classes will be used to compensate for differences in license fees when computing credits to be assigned to a playing on local radio or television. The intent again is to assign credits to playings according to the revenue yields to ASCAP by the licensees from which the playings emanate.

#### LOCAL RADIO CREDITS

About 8.75 million performance credits will be assigned to local radio.\* The local radio sample is designed to include 52,200 hours of programming after discarding, as duplicates, tapes of CBS and NBC network commercial broadcasts.

(ol. 239m) For the reasons previously discussed in connection with network radio and television, and because of possible variations in programming among geographic regions or among stations of different sizes, it is difficult to make a firm estimate of the number of performance credits

\* See table, p. 3.

the Society's Board of Directors to the rest of the membership. The provisions of the proposed order dealing with three of these phases are inadequate to achieve the antitrust purposes of this suit. These provisions of the proposed order are those relating to:

- (a) The requirement of the 1950 decree that ASCAP scientifically survey the performances of the compositions of its members as a basis for distributing its revenues to them. (Proposed Order, § II.)
- (b) ASCAP's distribution of such revenues to its members. (Proposed Order, § III (F), Weighting Rules and Weighting Formula.)
- (c) The extent to which ASCAP may weight the votes of its members. (Proposed Order, § IV.)

4. Section II of the proposed order is inadequate to accomplish the antitrust purposes of this suit for the following reasons:

- (a) It fails to require ASCAP to retain an independent agency employing non-ASCAP personnel exclusively, operating outside ASCAP's premises, and completely insulated from any influence by any ASCAP member (directors or otherwise), to conduct an objective survey of performances of works according to scientific sampling principles, to collect the data needed for the proposed Weighting Formula by using appropriate means with respect to all types of performances over the media involved, to make appropriate computations of performance credits attributable to the works performed, and to certify its results to the Society. An objective survey and allocation of performance credits is not possible so long as one group of competitors within the Society, the publishers directly represented on the Board of Directors, retains supervisory control over the collection of information which is the basis for such determinations, as would be permitted under § II of the proposed order. The mere employment of an "independent expert" to devise and oversee the application of a scientific sample, as § II proposes, will not remedy this



that will be assigned to each surveyed local radio playing. The best approximation at this time is that a surveyed playing on local radio of an ASCAP work entitled to full credit will be multiplied, *on the average*, by 16 to obtain the proper number of performance credits to be assigned to such playing. The multipliers will vary to some extent depending on the frequency of sampling the station on which the playing occurs and the ASCAP receipts from that station.

The multipliers which will actually be used in assigning performance credits will reflect experience gained from the results of the new survey.

#### LOCAL TELEVISION CREDITS

About 4.37 million performance credits will be assigned to local television.\* The local television sample is designed to include 30,600 hours of programming after discarding, as duplicates, tapes of CBS, NBC and ABC network broadcasts.

For the reasons stated above in connection with local radio, it is difficult to make a firm estimate of the number of performance credits that will be assigned to each surveyed local television playing. The best approximation at this time is that a surveyed playing on local television of an ASCAP work entitled to full credit will be multiplied, *on the average*, by 62 to obtain the proper number of performance credits to be assigned to such playing. The multipliers will vary to some extent depending on the frequency of sampling the station on which the playing occurs and the ASCAP receipts from that station.

[fol. 239n] The multipliers which will be actually used in assigning performance credits will reflect experience gained from the results of the new survey.

A relatively inexpensive and readily available source of information on local television programming is available from the *TV Guide* publications. By using *TV Guide*, local broadcasts that are randomly selected in the television sample can be identified and musical performances on these broadcasts identified by reference to cue sheets that

\* See table, p. 3.

defect, since he can and will judge only the mathematical accuracy of the formula, leaving the accuracy of the information to be sampled, and the allocation of performance credits under the control of persons who are themselves directly interested in the results.

(b) It fails to require a survey of local radio and television stations using procedures which have been employed by ASCAP since 1936 to survey network stations. (Only this will eliminate the monitoring of local radio and television stations by tape recorders which, even though these stations provide by far the Society's largest source of revenue, is admittedly a "woefully inadequate" and "inaccurate and inefficient" means for obtaining information regarding performances. (See plaintiff's memorandum of September 2, 1959.)) Tabulation of information obtained by these procedures when sampled according to scientific principles would minimize the possibility of error and the effect of deliberately false reporting at the source, while permitting an immense reduction in the number of unidentified local performances. Such a sampling method would also make possible the identification of "non-feature" performances and performances of public domain arrangements on local radio and television stations which are now, in fact, unsurveyed.

5. Section III(F), the Weighting Rules of the proposed order and the appended Weighting Formula are not equitable because they fail to adopt the principle that *ASCAP shall be permitted to discriminate in allocating performance credits between different types of performances but not between different works similarly performed*. Thus, [fol. 256] ASCAP's Board of Directors has not been deprived of its power to make different distributions of performance credits to members for similar uses of the members' music. Any distinction among compositions other than one relating solely to the amount of copyrighted and noncopyrighted material they contain or relating to type of performance is inequitable. Further, the proposed Weighting Rules do not provide for objective standards for

ASCAP can obtain. Where feasible, tapes of these local television broadcasts will also be obtained to provide a check against this information and to identify further playings where *TV Guide* information is inadequate or where cue sheets are unavailable.

#### CONCLUSION

The foregoing represents a general explanation of the new survey put into effect October 1, 1959. It will be subject to review and revision in the light of experience, particularly with respect to the aggregate number of playings on each of the media, the distribution of playings on local radio and television among stations in different size groups, the distribution of playings on network radio and television among hookups of various sizes, the variability of compositions played and disparity in cost among various segments of the survey, and the number of playings for which fractional credit is awarded.

It is a pleasure to acknowledge the cooperation of ASCAP and Sullivan & Cromwell in the development of this survey plan.

October 5, 1959

JOEL DEAN ASSOCIATES

[fol. 240] [File endorsement omitted]

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER AMENDING DOCUMENT ENTITLED "WEIGHTING FORMULA" ATTACHED TO THE ORDER TO SHOW CAUSE OF JUNE 29, 1959—Entered October 8, 1959

Upon the annexed consent of the parties hereto, it is hereby

Ordered that the document entitled "Weighting Formula" attached to the order to show cause herein signed by Chief

evaluating the amount of new, as against the amount of public domain, material in any composition.

6. Section IV of the proposed order will not achieve the antitrust purposes of the suit to "insure a democratic administration" of the affairs of ASCAP (see § XIII of the 1950 decree), for the following reasons:

(a) Under proposed § IV the publishers directly represented on the ASCAP Board, their affiliates and associates, comprising less than one per cent of the publisher membership of ASCAP, will still retain working control of the Society, holding 44 per cent of the total publisher vote and over 50 per cent of the publisher vote which is, on the average, actually cast and treated as valid in ASCAP elections. The 24 publishers next in size to the publishers directly represented on the Board will have but eleven per cent of the total publisher vote, and the remaining 1,300 or more publisher members of the Society will divide approximately evenly the other 45 per cent of the total publisher vote. For this reason 99 per cent of the publisher membership will still be without power to elect a single director to the ASCAP Board of Directors.

(b) Proposed § IV (E), which ostensibly permits minority representation by allowing a group of publishers constituting 1/12 of the total publisher vote to elect a candidate by petition is unworkable. Under the proposed voting system, it will require from 8 to 10 of the 24 publishers next in size to the publishers directly represented on the Board and their associates, to comprise the necessary 1/12 of the total publisher vote. [fol. 257] The ability of such a large group of competitors with conflicting business interests to agree upon one representative is doubtful, if not impossible. But this is the only group that will exist in the Society with a large enough share of the publisher vote to make a successful petition even theoretically possible.

"A democratic administration" of the Society can be secured only by instituting the following measures:

Judge Sylvester J. Ryan and dated June 29th, 1959, is hereby amended by inserting in Section (C)(3) of said "Weighting Formula" a new paragraph (c) as follows:

"(c) If the aggregate use credit allotted to qualifying works and works described in the last sentence of subparagraph (3)(b) above, performed as background music per each quarter hour of programming would exceed four use credits, the use credit allotted to each such work shall be reduced pro rata so that all such works performed as background music on the entire program shall receive an aggregate of four use credits per each quarter hour of programming."

[fol. 241] and changing the lettering of subparagraphs (3)(c), (d), (e) and (f) to (d), (e), (f) and (g), respectively.

Dated: October 8th, 1959

Sylvester J. Ryan, Chief Judge.

We hereby consent to the making and entry of the above order.

Dated: October 8, 1959

Richard B. O'Donnell, Attorney for Plaintiff.

Arthur H. Dean, Attorney for Defendants.

[fol. 242] It is proposed that the attached memorandum of Arthur H. Dean and the letter of Stanley Adams be sent with the annexed order to the membership of ASCAP.

Richard B. O'Donnell, Attorney, Department of Justice.

Howard T. Milman, Attorney for Defendant.

[fol. 243]

[ASCAP Letterhead]

October 9, 1959

To All Members of the Society:

Attached is a memorandum of Mr. Arthur H. Dean with respect to an amendment to the proposed Weighting Formula which was previously sent to the members together

(a) A class voting system should be created that would enable the smaller and smallest publisher members to elect representatives to the Board of Directors independently without the support of the largest publisher members.

(b) Standard (serious) music publishers must be provided with their own class of directors to whom sole control of the licensing of ASCAP's serious music should be granted in order to deprive the largest popular publishers of power to waive royalties on performances of serious music as a means of gaining good will in the music industry for their administration of ASCAP.

(c) Stringent restrictions must be placed on the election to the Board of Directors of officers of publishers owned by, or owning, licensees of the Society.

(d) Election to the Society's initial board of appeal (the "special board" of proposed § V (D)) must be on the same class-representation basis as that of the Board of Directors.

(e) Added insurance of a "democratic administration" of ASCAP would be provided through the appointment by this Court of public members to the Society's Board of Directors and board of appeals.

7. Apart from the inadequacies of the foregoing provisions of the proposed order, a decree, to be fair and [fol. 258] equitable and to fulfill the antitrust purposes of this suit, must also provide that each member of ASCAP shall be granted access to all records relating to the allocation of performance credits in the custody of the Society. The Board of Directors should be permitted to deny such access only for good cause shown (contrary to proposed order § V (C)). All decisions made by the ASCAP board of appeals must automatically be circulated to every member of the Society (contrary to proposed order § V (D)). Remittance statements to writer and publisher members must cover the same calendar period. All foreign revenues regardless of amount must be distributed to the respective



with the proposed Consent Order to be presented to Chief Judge Ryan on October 19, 1959. At Mr. Dean's request, a copy of this memorandum is being sent to all members of the Society:

Sincerely yours,

Stanley Adams, President.

October 9, 1959.

[fol. 244]

MEMORANDUM WITH RESPECT TO AN ADDITION TO THE  
PROPOSED WEIGHTING FORMULA

Each of the members has previously received a copy of the proposed Consent Order and Attachments A, B and C thereto; together with a copy of the proposed new Weighting Formula.

The members will note that the proposed Weighting Formula provides a credit limit of eight feature performances per quarter hour (see Section (B)(2)). It also contains limitations of credit for multiple themes during any quarter hour period (see Section (C)(2)(d)).

During our discussions with the Department of Justice, we discussed the desirability of a similar limitation on the number of use credits that should be allotted per quarter hour of programming for works performed as background music. In drafting the documents, it was provided in Attachment C to the proposed Consent Order (Weighting Rules) that ASCAP could promulgate rules limiting the credit to be awarded to aggregate performances of all works on a single program or during a period of programming (Section (D)).

The Department of Justice suggested that ASCAP set a limit of four use credits for "qualifying works" and [fol. 245] works described in the last sentence of Section (C)(3)(b) of the Weighting Formula\*\* performed as back-

\* See Section (C)(1) of the proposed Weighting Formula.

\*\* Works which have been commercially published, for general public distribution and sale, of which a commercial recording has been made as a "single" for general public distribution and sale, and five feature playings of which have been recorded in the Society's local radio sample survey during the five preceding fiscal survey years.

ground music per each quarter hour of programming. As the proposal seemed reasonable to ASCAP, we joined with the Department of Justice in an application to the Court to amend the proposed Weighting Formula in that respect.

Attached hereto is a copy of the order of Chief Judge Sylvester J. Ryan permitting such amendment.

Arthur H. Dean

[fol. 246]

[File endorsement omitted]

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF ARNOLD SAEMANN RE MAILINGS—  
Filed October 16, 1959

State of New York     )  
                                  ) ss.:  
County of New York    )

Arnold Saemann, being duly sworn, deposes and says:

I am over twenty-one years of age and am employed by the American Society of Composers, Authors, and Publishers (hereinafter "ASCAP"). My duties include the supervision of mailing documents to the members of ASCAP.

On October 9, 1959, envelopes were addressed to all members of ASCAP by running them through the ASCAP addressograph. Thereafter all such envelopes were delivered to Mr. William Straus of Neville Press, Inc.

Arnold Saemann

Sworn to before me this 15th day of October, 1959.

Henry Hofschuster, Notary Public, State of New York,  
No. 03-6934300, Qualified in Bronx County, Certificate filed  
in New York County, Commission Expires March 30, 1960.

[fol. 247]

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF WILLIAM STRAUSS AS TO MAILING DOCUMENTS  
—Filed October 16, 1959

State of New York     )  
                                  ) ss.:  
County of New York    )

William Strauss, being duly sworn, deposes and says:

I am over twenty-one years of age and am employed by Neville Press, Inc.

Exhibit A hereto attached is a copy of a booklet containing copies of (1) a letter dated October 9, 1959, addressed to all members of the American Society of Composers, Authors, and Publishers (hereinafter "ASCAP") and signed by Mr. Stanley Adams, President of ASCAP, (2) a "Memorandum With Respect To An Addition To The Proposed Weighting Formula", signed by Arthur H. Dean, Esq., and (3) an Order, dated October 8, 1959 and signed by Honorable Sylvester J. Ryan, Chief Judge, United States District Court for the Southern District of New York.

On October 9, 1959, I received from the offices of ASCAP at 545 Madison Avenue, New York 22, N. Y., packages stated to contain empty envelopes addressed to all members of ASCAP. Thereupon I delivered all such envelopes [fol. 248] and a quantity of copies of Exhibit A in excess of the number of such envelopes to The Garber Pollack Company, where one copy of Exhibit A, and no other documents or material, was inserted in each of such envelopes.

On October 9, 1959, all the aforesaid envelopes, securely sealed and postpaid, first-class, were mailed at the Church Street Station Branch of the New York Post Office.

William Strauss

[fol. 249b]

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

AMERICAN SOCIETY OF COMPOSERS,  
AUTHORS AND PUBLISHERS, et al.,

Defendants.

Upon the annexed consent of the parties hereto, it is hereby

ORDERED that the document entitled "Weighting Formula" attached to the order to show cause herein signed by Chief Judge Sylvester J. Ryan and dated June 29th, 1959, is hereby amended by inserting in Section (C)(3) of said "Weighting Formula" a new paragraph (c) as follows:

"(c) If the aggregate use credit allotted to qualifying works and works described in the last sentence of subparagraph (3)(b) above performed as background music per each quarter hour of programming would exceed four use credits, the use credit allotted to each such work shall be reduced pro rata so that all such works performed as background music on the entire program shall receive an aggregate of four use credits per each quarter hour of programming."

and changing the lettering of subparagraphs (3)(c), (d), (e) and (f) to (d), (e), (f) and (g), respectively.

Dated: October 8, 1959

(Sgd) SYLVESTER J. RYAN  
Chief Judge

We hereby consent to the making and entry of the above order.

Dated: October 8, 1959

RICHARD B. O'DONNELL  
Attorney for Plaintiff  
ARTHUR H. DEAN  
Attorney for Defendants

[fol. 250]

[File endorsement omitted]

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF MOTION AND MOTION OF SAM FOX PUBLISHING  
COMPANY, INC., ET AL., FOR PERMISSION TO INTERVENE—  
Filed October 13, 1959

Please Take Notice that upon the proposed further amended final judgment filed by the plaintiff herein, the annexed pleading in intervention, upon the accompanying memorandum of points and authorities, and a further memorandum to be filed on October 19, 1959, a motion will be made herein before Judge Ryan in his courtroom, United States Courthouse, Foley Square, New York City, on the 19th day of October, 1959, at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard, for an order permitting applicants to intervene as of right herein pursuant to Federal Rule of Civil Procedure 24(a), subparagraph (2), upon the ground that the representation of applicants' interest by existing parties is inadequate and applicants will be bound by a judgment herein, or in the alternative, pursuant to Rule 24(b), subparagraph (2), upon the ground that applicants' claims and the main action have a question of law or fact in common.

[fol. 251] Dated: October 13, 1959, New York, New York.

Herbert Cheyette, Attorney for Applicants, Sam  
Fox Publishing Company, Inc., Movietone Music  
Corporation, Pleasant Music Publishing Corporation,  
Jefferson Music Company, Inc., 11 West 60th  
Street, New York 23, New York.

To:

William D. Kilgore, Jr., Esq., Department of Justice,  
Washington 25, D. C., Attorney for Plaintiff.

Arthur H. Dean, Esq., 48 Wall Street, New York, New  
York, Attorney for Defendant.

writers and publishers having an interest therein (contrary to proposed order § III (E)).

Wherefore, applicants respectfully pray that the proposed order be rejected by the Court, and that any modified decree which is approved by the Court include provisions necessary to accomplish the antitrust purposes of this suit as stated in Paragraphs 4 through 7 above.

Herbert Cheyette, 11 West 60th Street, New York, New York.

Charles A. Horsky, Alvin Friedman, 701 Union Trust Building, Washington 5, D. C., Attorneys for Applicants, Sam Fox Publishing Company, Inc., Pleasant Music Publishing Corporation, Jefferson Music Company, Inc., Movietone Music Corporation.

Dated: Washington, D. C., October 13, 1959.

[fol. 315]

EXHIBIT 3

UNITED STATES DEPARTMENT OF JUSTICE  
WASHINGTON, D. C.

(Emblem)

Address Reply to the  
Division Indicated  
and Refer to Initials and Number

RAB:WDK  
60-22-5

August 5, 1959

Herman Finkelstein, Esquire  
575 Madison Avenue  
New York 22, New York

Re: United States v. American Society of  
Composers, Authors and Publishers

Dear Mr. Finkelstein:

Pursuant to a suggestion made by Mr. Lloyd Cutler I am referring to you a series of questions submitted to this Department by a member of ASCAP. Will you prepare



answers to these questions and send them to me for forwarding to the member.

I anticipate that you will not have any information from which you can prepare an answer to question 7. A statement to that effect will suffice.

Your cooperation in this matter is appreciated.

Sincerely yours,

/s/ ROBERT A. BICKS

ROBERT A. BICKS

Acting Assistant Attorney General  
Antitrust Division

cc: Lloyd N. Cutler, Esquire  
1625 I Street, N. W.  
Washington, D. C.

[fol. 315a] 1. With respect to provision III-E of the proposed order:

A. How many foreign societies furnish remittances of more than \$200,000.00 per year to ASCAP?

a. If any, name them.

b. If any, state the number of years the remittances have been more than \$200,000.00.

B. How many foreign societies make remittances to ASCAP?

2. With respect to provision IV-B of the proposed order:

Using the last annual ASCAP remittances to publishers as a basis with respect to the proposed new publishers voting formula, state the following:

a. The number of votes that will be cast by each of the publisher members and affiliated publishers now represented on the Society's Board of Directors? What percentage of the total possible vote will said Board of Directors and affiliated publishers control?

b. State the number of votes capable of being cast by the 50 publishers receiving the great-

est distribution from the Society. Indicate which, if any, of these 50 publishers are affiliated with each other.

- c. State the total number of publishers who will have one vote.
- d. State the total number of votes capable of being cast.
- e. Excluding the publishers represented on the Board of Directors and their affiliated companies what is the minimum number of publishers that will be capable of combining so as to constitute one-twelfth of the total possible vote.

3. With respect to provision IV-B of the proposed order:

- a. State the number of years each of the publishers currently represented on the Board of Directors, has had a representative on the Board of Directors.

[fol. 315b] 4. With respect to the proposed "Weighting Rules", Section 5-B:

Of the 377 works owned by publishers represented on the Society's Board of Directors being used as themes and having accumulated 20,000 credits as of April 2, 1958, according to the ASCAP affidavit "A-14" in the appendix to the record of the Hearings before Subcommittee No. 5 of the Select Committee on Small Business, House of Representatives, page 538, question 9, how many of these works accumulated their 20,000 credits in the two years first succeeding the first performance recorded in the ASCAP survey?

5. With respect to the proposed "Weighting Rules", Section 5-B:

For each year beginning January 1, 1943 state—

- a. The type of survey employed by ASCAP, if any.

- b. The media surveyed, if any.
- c. The type of sample, if any.
- d. The data taken, if any.
- e. Type of records kept and presently extant in the files of the Society.

State generally the information and data shown in the above records with respect to each of the years in question.

6. With respect to the proposed "Weighting Rules", Section 5-B:

What is the first date on which ASCAP surveyed the following:

- a. Local radio stations.
- b. Network radio stations.
- c. Local TV stations.
- d. Network TV stations.
- e. What is the date on which a procedure was first instituted whereby reference tapes were taken on a continuing basis of performances in each of the above?
- [fol. 315c] f. What is the date on which an objective sample was first instituted by the Society?
- g. With respect to the media mentioned above, what is the date on which types of uses were first indicated in the ASCAP survey?
- h. With respect to the media mentioned above, what is the date on which duration of performance was first indicated?
- i. What is the significance of the dates January 1, 1943? October 1, 1955?

7. With respect to the proposed "Weighting Formula" provision 8-F:

What percent of the uses in the following media are "live" and what percent "recorded", according to the current ASCAP survey?

- a. Radio network.
- b. Local radio.
- c. TV network.
- d. TV local.

With respect to the above interrogatories, it is not necessary to mention any publisher by name.

[fol. 316]

EXHIBIT 4

SULLIVAN & CROMWELL

48 WALL STREET

NEW YORK 5

CABLE ADDRESS "LADYCOURT"

September 4, 1959

C

O

P

Y

Herbert Cheyette, Esq.,  
11 West 60th Street,  
New York, New York.

Dear Mr. Cheyette:

After receiving your letter of July 14, 1959 to Mr. Robert Bicks, the Department of Justice advised us that these questions had been asked by a member of ASCAP but without giving the identity of the member making the request.

It seemed appropriate that the answer to these questions be given to all the members of ASCAP together with the answers to questions asked by other members, and it was decided that the answers would be included in Mr. Dean's remarks at the membership meetings on the West Coast and in New York. This was done and a printed copy of Mr. Dean's West Coast remarks has been mailed to each member of the Society. A printed copy of Mr. Dean's remarks in New York is being mailed today to each member, and I enclose an extra copy for your convenience.

Since that time, we have been advised of further questions which you have asked on behalf of Sam Fox Publishing Company, a member of the Society.

As we understand that you are now asking these questions of ASCAP on behalf of a member, and completely apart from any pending motion with regard thereto, we are happy to furnish the information which you have requested.

[fol. 316a] So that you may have all the answers in a single document, we restate the answers already furnished to you and all the other members by Mr. Dean.

1. A. Remittances of more than \$200,000 per year have been received by ASCAP from England since 1943, from France since 1952, from Canada since 1953, and from West Germany since 1955.

B. ASCAP receives remittances from approximately twenty-two foreign Societies.

2. (a) The number of votes of the publisher members now represented on the Board of Directors, including affiliated publishers, would initially aggregate about 1,505 votes out of a total of 4,908 votes. Of the twelve publisher members of the Board of Directors, including affiliated members, one would have 424 votes, one would have 393 votes, one would have 254 votes, three would have between 98 and 111 votes, three would have between 21 and 43 votes and three would have between 3 and 6 votes.

(b) According to the latest available figures, the fifty publishers with the highest number of current performance credits (the proposed basis for allocating votes), would have 2,479 out of a total of 4,908 publisher votes. Fourteen of these publishers are affiliated with others among the top fifty.

(c) 409 publisher members would have one vote each.

(d) The total number of publisher votes capable of being cast, based upon the latest available figures, would be 4,908.

[316b] (e) The breakdown of the total possible vote, and the votes actually cast, in each election of the Board of Directors for the past nine years, by the writers and publishers respectively is as follows:

Board of Directors Elections		Potential Vote	Number of Votes Cast	% of Votes Cast to Potential
March 26, 1959	Writers	503,510	397,347	78.9
	Publishers	22,363	19,554	87.4
March 25, 1957	Writers	432,955	337,057	77.8
	Publishers	19,184	16,885	88.0
March 28, 1955	Writers	408,659	306,982	75.1
	Publishers	17,782	16,529	93.0
March 30, 1953	Writers	223,142	168,240	79.5
	Publishers	12,517	10,165	81.2
March 22, 1951	Writers	156,462	124,408	79.5
	Publishers	8,687	8,218	94.6

Note: Number of Votes Cast—Includes Ballots which were Improperly Voted and Ballots which were Unsigned.

(f) The following gives the percentage of the publishers' total distribution of revenue which was received by Board publisher members and their affiliates during the last five years:



[fol. 316c]

Year	Total Publishers' Distribution	Distribution to Board, Publisher Members and Affiliated Companies	Percentages
1954 .....	\$ 8,715,755	\$5,506,547	63.21%
1955 .....	8,892,154	5,436,155	61.13%
1956 .....	9,349,302	5,599,246	59.88%
1957 .....	10,343,563	6,216,557	60.09%
1958 .....	10,884,149	6,249,166	57.40%

3. (a) Excluding the publishers represented on the Board of Directors and their affiliated companies, the minimum number of publishers that would be capable of combining to constitute  $1/12$  of the possible vote, according to the latest available figures, is four.

(b) Under the voting procedure provided in Section IV (E), the number of votes is based upon the number of current performance credits received in the latest available fiscal survey year preceding each election. It is expected that in July of each year each member will be advised of his number of current performance credits received in the preceding fiscal survey year, from which he can determine the number of his votes by referring to Article IV of the proposed Order. Elections for Directors are generally held in March and votes would be based upon the current performance credits of which the member would have been notified during the preceding July. The Society, in July of each year or shortly thereafter, will have available the number of total possible votes for elections to be held during the succeeding year.

[fol. 316d] 4. Of the twelve publishers currently represented on the Board of Directors, two of them have been so represented since 1914, two since 1924, one since 1938, two since 1939, one since 1947, three since 1957, and one since 1959.

5. Of the 377 works referred to, 31 works published between 1936 and January 1, 1943 received over 20,000 credits in the first two years and 31 works published

subsequent to January 1, 1943 received over 20,000 credits in the first two years. For further information, see pages 28-29 of Mr. Dean's printed remarks at the New York meeting.

6. The Society has been surveying all radio network performances since 1936 by use of logs furnished by the networks. A similar survey of television network performances was started in 1949. A sample survey has been conducted of local radio programs since 1950 and of local television programs since 1951; the local surveys have been conducted by taking tape recordings of sample programs, supplemented in the case of local television by the use of "TV Guide" and film cue sheets. In addition the Society has surveyed performances by symphonic and concert licensees.

The Society samples each day by use of tape recorders located in 22 major metropolitan cities, a three-hour period of radio broadcasting by a station, selected randomly and in non-biased fashion, located in each of these areas and samples a similar period of television presentation by randomly selecting stations located in these areas.

The Society also receives three-hour tapes of local radio broadcasts from approximately 14 roving financial auditors, who take daily tapes of radio stations located throughout the country in areas other than those represented by the 22 fixed locations. The tapes of local television programs are supplemented by local film programs selected randomly by the "TV Guide" presentations. The music content of these programs are obtained from film "cue sheets".

Starting January 1, 1943, dates of all performances were recorded and, when the local surveys started, performances on local radio and television were so noted. Starting October 1, 1955, the records of the Society indicate the various uses of a given performance, such as feature use, theme, background, jingle, etc. These records are extant in the files of the Society.

7. See answer to question 6 with respect to items (a), (b), (c), (d), (f), (g) and (i).

All local radio and television tapes are "reference tapes" and such tapes have been taken since 1950 on local radio and since 1951 on local television. "Reference tapes" for network radio and television have been taken since January 1957.

A durational credit system was inaugurated in 1945 and assumed its present form in 1955 for local performances and in 1957 for network performances.

8. We are advised that ASCAP does not compile statistics as to the percentages of its income distributed by reason of feature performances, themes, jingles, background music and cue or bridge music.

We are further advised that ASCAP does not compile statistics as to the percentages of the logged performances in the ASCAP survey attributable to uses as feature performances, jingles, themes, background music or cue and bridge music, except that for the [fol. 316f] period January 1, 1957 through September 30, 1957 (and that period only), there was prepared a summary of performances (playings) logged in the ASCAP survey, which indicates the breakdown among (i) feature performances, (ii) jingles, (iii) themes and (iv) background and cue and bridge music; the figures for that period are:

Feature performances .....	62.73%
Jingles .....	7.55%
Themes .....	10.13%
Background, cue and bridge music .....	19.59%

Note: No separate figures are available for background music alone or for cue and bridge music alone.

9. The Society's survey does not distinguish between "live" and "recorded" performances, and the Society has no record as to the percentages of use of "live" or "recorded" performances.

Very truly yours,

Howard T. Milman

CC: William D. Kilgore, Jr., Esq.  
Antitrust Division  
United States Department of Justice  
Washington, D. C.

[fol. 319]

## EXHIBIT 7

CABLE ADDRESS — SAMFOX NEWYORK

SAM FOX PUBLISHING COMPANY  
INCORPORATED

MUSIC [Emblem] PUBLISHERS

RCA BUILDING • RADIO CITY • NEW YORK, N. Y.  
CHICAGO • HOLLYWOOD*New Address*THIS LETTER FROM  
NEW YORK OFFICE  
11 WEST 60TH STREET  
NEW YORK 23, N. Y.

PHONE: CIRCLE 7-3890

HERBERT CHEYETTE  
RESIDENT COUNSEL

September 16, 1959

Mr. Herman Finkelstein  
ASCAP  
575 Madison Avenue  
New York 22, N. Y.

Dear Mr. Finkelstein:

Pursuant to our telephone conversation, I am hereby requesting ASCAP to supply me with the following information:

1. The exact dates during which the following members have served on the ASCAP Board of Directors:
  - (a) Jack Bregman
  - (b) Richard Murray
  - (c) Bernard Goodwin
  - (d) Saul Bourne

2. The exact dates during which the Music Publishers Holding Company has had a representative on the Board of Directors.

Thank you for your prompt reply.

Sincerely yours,

SAM FOX PUBLISHING COMPANY, INC.

/s/ FREDERICK FOX  
Frederick Fox

HC:am

[fol. 320]

EXHIBIT 8

September 17, 1959

Mr. Frederick Fox  
Sam Fox Publishing Company, Inc.  
11 West 60th Street  
New York 23, N. Y.

Dear Mr. Fox:

The following information is furnished in answer to your letter of September 16:

1. The following members of the Board of Directors served for the periods indicated:

Jack Bregman ..... 9/19/35- 3/25/47  
8/27/57 to date

Richard Murray ..... 8/27/41-12/31/45

Bernard Goodwin ..... 2/13/51- 6/27/57  
4/28/59 to date

Saul Bourne ..... 1/ 1/21-10/13/57

2. Music Publishers Holding Company does not have a representative on the Board of Directors. I understand, however, that it was organized in 1929 and that Harms, Inc. and M. Witmark and Sons are and have been subsidiaries of that corporation since that time. On of these companies

or the other has been represented on the Board of Directors during the following periods:

1929 to July 17, 1935  
 October 19, 1935 to December 5, 1935  
 October 28, 1936 to date

I trust this is the information you desire.

Sincerely yours,  
 Herman Finkelstein

HF:H

[fol. 323]

EXHIBIT 11

CABLE ADDRESS — SAMFOX NEWYORK

**SAM FOX PUBLISHING COMPANY**  
 INCORPORATED

MUSIC [Emblem] PUBLISHERS

RCA BUILDING · RADIO CITY · NEW YORK, N. Y.  
 CHICAGO · HOLLYWOOD

*New Address.*

THIS LETTER FROM  
 NEW YORK OFFICE  
 11 WEST 60TH STREET  
 NEW YORK 23, N. Y.

PHONE: CIRCLE 7-3890

HERBERT CHEYETTE  
 RESIDENT COUNSEL

September 28, 1959

Mr. Herman Finkelstein  
 ASCAP  
 575 Madison Avenue  
 New York 22, N. Y.

Dear Mr. Finkelstein:

As a member, would you kindly supply to us the following information:



The amount of publisher current performance credits and publisher revenue received by the following publishers and other "groups of affiliated publisher members" (as that term is used in ASGAP's Articles of Association) during the year 1958.

The publishers are as follows:

M.P.H.C.  
THE BIG THREE  
CHAPPELL  
MILLS  
SHAPIRO-BERNSTEIN  
SCHIRMER  
FISCHER  
PARAMOUNT  
BOURNE

It will not be necessary to identify these publishers by name.

Sincerely yours,

SAM FOX PUBLISHING COMPANY, INC.

/s/ FREDERICK FOX  
Frederick Fox

HC:am

[fol. 324]

EXHIBIT 12

October 7, 1959

Mr. Frederick Fox  
Sam Fox Publishing Company  
RCA Building—Radio City  
New York, New York

Dear Mr. Fox:

Your letter to me of September 28 arrived while I was out of town. I have just returned and have had the information you requested compiled.

The following are lists of the performance credits earned and the amounts distributed, during the periods indicated,

for the publishers referred to in your letter, as well as their affiliated companies.

Current Performance Credits Survey Year 10/1/57-9/30/58	Amount Distributed Year 1958
5,273,563.56 .....	\$1,903,951.18
3,652,743.46 .....	1,290,013.41
3,219,757.01 .....	1,342,367.24
1,135,049.40 .....	490,727.69
972,117.21 .....	345,004.64
911,561.73 .....	396,143.78
891,423.29 .....	346,557.30
225,061.22 .....	124,926.50
218,245.05 .....	107,781.04

Sincerely yours,

Herman Finkelstein

HF:Pm

[fol. 325]

EXHIBIT 13

*New Address:*

443 WEST 49TH ST.  
NEW YORK 19, N. Y.  
TEL. CIRCLE 7-3632

**PLEASANT MUSIC PUBLISHING CORP.**

117 WEST 48TH STREET  
NEW YORK 19, N. Y.  
CIRCLE 7-3632

September 30, 1959

Mr. Herman Finkelstein  
A. S. C. A. P.  
575 Madison Avenue  
New York 22, New York

Dear Herman:

I am trying to form my own opinion about the changes that have been proposed for the voting and distribution in ASCAP.

In order to analyze all the facts properly, I would appreciate the following information:

- (1) What was the net amount of distribution for publishers for the years 1952, and 1953, respectively?
- (2) What are the names of the ten largest publishers and their affiliates, referred to in Section IV C of the proposed Consent Decree, on the basis of the most recent ASCAP distribution?
- (3) What is the minimum number of publishers, excluding the top ten and Carl Fischer and G. Schirmer, that would comprise one-twelfth of the Society's vote under the proposed new voting system?

Thanking you, and with kindest regards,

Sincerely yours,

PLEASANT MUSIC PUBLISHING CORP.

/s/ HANS

H. J. Lengsfelder

HJL:jga

[fol. 326]

EXHIBIT 14

October 7, 1959

Mr. H. J. Lengsfelder  
Pleasant Music Publishing Corporation  
443 West 49th Street  
New York 19, N. Y.

Dear Hans:

I have your letter of September 30. It arrived while I was out of town.

I shall treat the questions you put to me in the order set out in your letter:

1. The net distribution to publisher members in 1952 and 1953 was as follows:

1952—\$6,145,188.41

1953 — \$6,516,111.15

2. You will find enclosed a list of the ten publisher groups with the largest publisher votes according to the distribution for the survey year 1958 (10/1/57 — 9/30/58).

3. Based on the publisher performance credits for the 1958 survey year, it would require 8 publishers and their affiliates (excluding the top 10 and Carl Fischer and G. Schirmer) to comprise 1/12 of the publisher vote under the proposed new voting system. As you know, four publishers who are not on the board of directors would in the aggregate have more than one-twelfth of the votes.

Sincerely yours,

Herman Finkelstein

HF:H

enc.

cc PM

cc Mr. Milman

[fol. 326a]

# LIST OF TEN PUBLISHER GROUPS WITH LARGEST PUBLISHER VOTES

## BOURNE, INC., GROUP

A. B. C. MUSIC CORPORATION

BOGAT MUSIC CORPORATION

BOURNE, INC.

LADY MAC MUSIC CO.

## BREGMAN GROUP

BREGMAN, VOCCO & CONN, INC.

CHATHAM MUSIC

LOMBARDO MUSIC INC.

ROSEMEADOW PUBLISHING CORP.

SUPREME MUSIC CORP.

TRIANGLE MUSIC CORP.

VERNON MUSIC CORP.

## CHAPPELL GROUP

A. M. MUSIC CORP.

BUXTON HILL MUSIC CORP.

CHAPPELL & Co., INC.  
DE SYLVA, BROWN & HENDERSON  
ELAR MUSIC CORP.  
G & C MUSIC CORP.  
GERSHWIN PUB. CORP.  
SAMUEL GOLDWYN MUSIC PUB. CORP.  
T. B. HARMS Co.  
IVY MUSIC CORP.  
JUBILEE MUSIC  
LOWAL MUSIC CORP.  
MCHUGH & ADAMSON MUSIC INC.  
MUTUAL MUSIC SOCIETY, INC.  
THE PLAYERS MUSIC CORP.  
PUTNAM MUSIC, INC.  
STRATFORD MUSIC CORP.  
WILLIAMSON MUSIC, INC.  
VICTOR YOUNG PUBLICATIONS, INC.

#### FAMOUS GROUP

BIRDEES MUSIC CORP.  
BURVAN MUSIC CORP.  
FAMOUS MUSIC CORP.  
PARAMOUNT MUSIC CORP.  
PARAMOUNT-ROY ROGERS MUS.

[fol. 326b]

#### LOU LEVY GROUP

BLOSSOM MUSIC CORP.  
DELKAS MUSIC PUB. CO.  
HUBERT MUSIC CORP.  
LEEDS MUSIC CORP.  
PICKWICK MUSIC CORP.

#### MILLS GROUP

AMERICAN ACADEMY OF MUSIC  
MILLS MUSIC INC.  
B. F. WOOD MUSIC CO.

#### MORRIS GROUP

CHARLING MUSIC CORP.  
CRESTVIEW MUSIC CORP.

HARWIN MUSIC CORP.  
JAYVEE MUSIC PUBLISHING CO.  
MAYFAIR MUSIC CORP.  
MELROSE MUSIC CORP.  
MORLEY MUSIC CO., INC.  
EDWIN H. MORRIS & CO., INC.

**ROBBINS GROUP**

LEO FEIST, INC.  
WALTER JACOBS, INC.  
LION MUSIC CORP.  
MILLER MUSIC CORP.  
PINE RIDGE MUSIC, INC.  
ROBBINS MUSIC CORP.  
VARIETY MUSIC  
P.D.S. MUSIC PUBLISHERS INC.  
VILLA MORET, INC.

**SHAPIRO BERNSTEIN GROUP**

COLUMBIA PICTURES MUSIC CORP.  
MOOD MUSIC CO., INC.  
SHAPIRO, BERNSTEIN & CO., INC.  
SKIDMORE MUSIC CO., INC

**WARNER GROUP**

ADVANCED MUSIC CORP.  
ATLAST MUSIC CORP.  
FULLARTON MUSIC, INC.  
HARMS, INC.  
NEW WORLD MUSIC CORP.  
REMICK MUSIC CORP.  
SHUBERT MUSIC PUB. CORP.  
VICTORIA PUBLISHING CO.  
M. WITMARK & SONS



[fol. 327]

EXHIBIT 15

(Stamp)

*New Address:*

443 WEST 49TH ST.  
NEW YORK 19, N. Y.  
TEL. CIRCLE 7-3632

*PLEASANT MUSIC PUBLISHING CORP.*

117 WEST 48TH STREET  
NEW YORK 19, N. Y.  
CIRCLE 7-3632

October 13, 1959

Mr. Herman Finkelstein  
A. S. C. A. P.  
575 Madison Avenue  
New York 22, New York

Dear Herman:

Thank you for your prompt answer to my questions regarding the new Order.

I am sorry if I have to bother you once more and ask for the names of the eight publishers and their affiliates that would make up one-twelfth of the publisher votes (excluding the top ten, Carl Fischer, and G. Schirmer.)

However, you will understand that with changes that eventually will take place, it will be important to know which publishers can petition for one Board member.

Thanking you, I remain

Sincerely,

/s/ H. J. LENGSFELDER  
H. J. Lengsfelder

HJL:jga

October 16, 1959

Mr. Hans J. Lengsfelder  
Pleasant Music Publishing Corp.  
443 West 49th Street.  
New York 19, N. Y.

Dear Hans:

In your letter of October 13, you ask for "the names of the eight publishers and their affiliates that would make up one-twelfth of the publisher votes (excluding the top ten, Carl Fischer, and G. Schirmer)". Those eight are the following:

Emil Ascher, Inc.  
Irving Berlin Music Corp.  
Walt Disney Music Co.  
The Sam Fox Group  
Frank Music Corp.  
Joy Music, Inc.  
Melody Music, Inc.  
The Ralph Peer Group

As you know, several of the top ten publishers are not represented on the Board of Directors. Perhaps I should point out that four publishers not on the Board of Directors would have enough votes to elect a member of the Board. Those four are:

The Bourne Group  
The Famous-Paramount Group  
The Lou Levy Group  
The Edwin H. Morris Group

Sincerely,

Herman Finkelstein

HF:H

By HAND

[fol. 329]

EXHIBIT 17

CABLE ADDRESS "SOUTHMUSIC"

SOUTHERN MUSIC PUBLISHING COMPANY, INC.

1619 BROADWAY — AT FORTY-NINTH STREET

NEW YORK 19, N. Y.

[Emblem]

August 19, 1959

Mr. Richard Murray  
 American Society of Composers,  
 Authors and Publishers  
 575 Madison Avenue  
 New York 21, New York

Dear Mr. Murray:

I wonder if you would be kind enough to give to me a list of the Publisher Members of the board of ASCAP, along with the publishers which they control. I believe that you once told me that the board under the new system of voting would control 41% of the votes. I would like to determine how this total is arrived at, in other words, how many votes each publisher member controls through his various owned or controlled companies.

Thanking you in advance, I am,

Sincerely yours,

SOUTHERN MUSIC PUBLISHING COMPANY, INC.

J. L. Lister

JLL:la

[fol. 330]

EXHIBIT 18

August 26, 1959

Mr. J. L. Lister  
 Southern Music Publishing Company, Inc.  
 1619 Broadway  
 New York 19, N. Y.

Dear Mr. Lister:

As requested in your letter of August 19, there is enclosed a list of the publisher members of the Board of Directors and the companies which they represent.

The votes will be distributed as follows:

The greatest number of votes of firms affiliated with any one publisher member of the Board is 424. The next highest member is 394; 3 will be between 108 and 253; 3 between 39 and 98, and 4 between 1 and 6 votes.

The total number of publisher votes based on the latest available year will be 4,908 of which slightly over 30% will be represented on the Board of Directors.

If you will give me the list of the publishing firms of ASCAP in which Southern Music Publishing Company or Ralph Peer have an interest, I shall be happy to give you their votes and the manner in which they are computed.

The reference in your letter to 41% of the publisher votes under the new system must be to something you read in the trade papers. I do not recall discussing it with you at any time. It probably refers to the top ten publishers, not all of whom are on the Board. The votes of the top ten aggregate 37.1%. Under the proposed order, the aggregate votes of the top ten could increase by not more than 10% or to an aggregate of 41%.

The basis of computing votes is set forth in the proposed consent order at pages 9 to 10 of the booklet sent to the membership on July 10, 1959.

Sincerely yours,

R. F. Murray

enc.



[fol. 330a]

Handwritten notation—list as sent 8/26/59]

## PUBLISHER MEMBERS OF BOARD AND THEIR PUBLISHING HOUSES

**LOUIS BERNSTEIN :**

COLUMBIA PICTURES MUSIC CORPORATION

MOOD MUSIC COMPANY, INC.

SHAPIRO, BERNSTEIN & COMPANY, INC.

SKIDMORE MUSIC COMPANY, INC.

**J. J. BREGMAN :**

BREGMAN, VOCCO & CONN, INC.

CHATHAM MUSIC

LOMBARDO MUSIC, INC.

ROSEMEADOW PUBLISHING CORP.

SUPREME MUSIC CORP.

TRIANGLE MUSIC CORP.

VERNON MUSIC CORP.

**IRVING CAESAR :**

IRVING CAESAR

**FRANK H. CONNOR :**

CARL FISCHER, INC.

FILLMORE MUSIC HOUSE

**MAX DREYFUS :**

A-M MUSIC CORPORATION

BUXTON HILL MUSIC CORPORATION

CHAPPELL & COMPANY, INC.

DE SYLVA, BROWN & HENDERSON, INC.

ELAR MUSIC CORP.

G & C MUSIC CORPORATION

GERSHWIN PUBLISHING CORPORATION

SAMUEL GOLDWYN MUSIC PUBLISHING CORPORATION

T. B. HARMS COMPANY

IVY MUSIC CORP.

JUBILEE MUSIC

LOWAL CORPORATION  
 McHUGH AND ADAMSON MUSIC, INC.  
 MUTUAL MUSIC SOCIETY, INC.  
 THE PLAYERS MUSIC CORPORATION  
 PUTNAM MUSIC  
 STRATFORD MUSIC CORPORATION  
 WILLIAMSON MUSIC, INC.  
 VICTOR YOUNG PUBLICATIONS, INC.

BERNARD GOODWIN:

LIVINGSTON AND EVANS, INC.  
 NORTHRIDGE MUSIC CO.

JOHN D. MARKS:

ST. NICHOLAS MUSIC, INC.

JACK MILLS:

AMERICAN ACADEMY OF MUSIC, INC.  
 MILLS MUSIC, INC.  
 THE B. F. WOOD MUSIC COMPANY

RUDOLF TAUHERT:

G. SCHIRMER, INC.

[fol. 330b]

MAURICE SCOPP:

LEO FEIST, INC.  
 WALTER JACOBS, INC.  
 LION MUSIC CORP.  
 MILLER MUSIC CORPORATION  
 PINE RIDGE MUSIC, INC.  
 ROBBINS MUSIC CORPORATION  
 VARIETY MUSIC, INC.  
 VILLA MORET, INC.

HERMAN STARR:

ADVANCED MUSIC CORPORATION  
 ATLAS MUSIC CORPORATION  
 HARMS, INC.



NEW WORLD MUSIC CORPORATION  
 REMICK MUSIC CORPORATION  
 SHUBERT MUSIC PUBLISHING CORP.  
 VICTORIA PUBLISHING COMPANY  
 M. WITMARK & SONS

ADOLPH VOGEL:

ELKAN-VOGEL Co., Inc.

[fol. 331]

EXHIBIT 19

CABLE ADDRESS "SOUTHMUSIC"

SOUTHERN MUSIC PUBLISHING COMPANY, INC.  
 1619 BROADWAY — AT FORTY-NINTH STREET  
 NEW YORK 19, N. Y.

[Emblem]

September 1, 1959

Mr. Richard Murray  
 American Society of Composers, Authors  
 and Publishers  
 575 Madison Avenue  
 New York 22, New York

Dear Mr. Murray:

I wonder if you could provide me with a list of the 12 publisher members of the Board in 1940 prior to the inception of the first consent decree, and then a list of the Board members each year after that or at least indicate the changes each year which occurred on the Publisher Board.

Thanking you in advance, I am,

Very truly yours,

J. L. Lister

JLL:zs

[fol. 332]

EXHIBIT 20

MURRAY HILL 8-8800

CABLE ADDRESS: ASCAP, NEW YORK

AMERICAN SOCIETY OF  
COMPOSERS, AUTHORS AND PUBLISHERS  
575 MADISON AVENUE  
NEW YORK 22, N. Y.

[Emblem]

September 9, 1959

C  
O  
P  
Y

Mr. J. L. Lister  
Southern Music Publishing Company, Inc.  
1619 Broadway  
New York 19, N. Y.

Dear Mr. Lister: \*

In accordance with your letter request of September 1st, 1959, I am attaching a list of publisher members of the Board of Directors since 1940 and up to and including the present year 1959.

Sincerely yours,

R. F. MURRAY

enc.  


[fol. 332a]

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS  
PUBLISHERS — BOARD OF DIRECTORS  
1940 — 1959

1940

LOUIS BERNSTEIN  
SAUL BORNSTEIN  
J. J. BREGMAN  
MAX DREYFUS  
GEORGE FISCHER  
WALTER FISCHER  
JACK MILLS  
JOHN O'CONNOR  
J. J. ROBBINS  
GUSTAVE SCHIRMER  
HERMAN STARR  
WILL VON TILZER

1941

LOUIS BERNSTEIN  
SAUL BORNSTEIN  
J. J. BREGMAN  
MAX DREYFUS  
GEORGE FISCHER  
(Died 8/23/41)  
WALTER FISCHER  
A. WALTER KRAMER  
JACK MILLS  
R. F. MURRAY  
JOHN O'CONNOR  
J. J. ROBBINS  
GUSTAVE SCHIRMER  
HERMAN STARR  
WILL VON TILZER  
(Term Expired 8/27/41)

1942

LOUIS BERNSTEIN  
SAUL BORNSTEIN  
J. J. BREGMAN  
MAX DREYFUS  
WALTER FISCHER  
DONALD GRAY  
A. WALTER KRAMER  
(Term Expired 4/1/42)  
JACK MILLS  
R. F. MURRAY  
JOHN O'CONNOR  
J. J. ROBBINS  
GUSTAVE SCHIRMER  
HERMAN STARR

1943

LOUIS BERNSTEIN  
SAUL BORNSTEIN  
J. J. BREGMAN  
MAX DREYFUS  
WALTER FISCHER  
DONALD GRAY  
JACK MILLS  
R. F. MURRAY  
JOHN O'CONNOR  
J. J. ROBBINS  
GUSTAVE SCHIRMER  
HERMAN STARR

[fol. 332b]

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS  
PUBLISHERS — BOARD OF DIRECTORS  
1940 — 1959

1944

LOUIS BERNSTEIN  
SAUL H. BOURNE  
J. J. BREGMAN  
MAX DREYFUS  
WALTER FISCHER  
DONALD GRAY  
JACK MILLS  
R. F. MURRAY  
JOHN O'CONNOR  
J. J. ROBBINS  
GUSTAVE SCHIRMER  
HERMAN STARR

1946

LOUIS BERNSTEIN  
SAUL H. BOURNE  
J. J. BREGMAN  
FRANK CONNOR  
MAX DREYFUS  
WALTER FISCHER  
(Died 4/46)  
DONALD GRAY  
JACK MILLS  
JOHN O'CONNOR  
ABE OLMAN  
J. J. ROBBINS  
(Resigned 5/40)  
LESTER SANTLY  
GUSTAVE SCHIRMER  
HERMAN STARR

1945

LOUIS BERNSTEIN  
SAUL H. BOURNE  
J. J. BREGMAN  
MAX DREYFUS  
WALTER FISCHER  
DONALD GRAY  
JACK MILLS  
R. F. MURRAY  
(Resigned 12/20/45)  
JOHN O'CONNOR  
J. J. ROBBINS  
LESTER SANTLY  
GUSTAVE SCHIRMER  
HERMAN STARR

1947

LOUIS BERNSTEIN  
SAUL H. BOURNE  
J. J. BREGMAN  
(Term Expired 3/47)  
IRVING CAESAR  
FRANK CONNOR  
MAX DREYFUS  
DONALD GRAY  
JACK MILLS  
JOHN O'CONNOR  
ABE OLMAN  
LESTER SANTLY  
GUSTAVE SCHIRMER  
HERMAN STARR

[fol. 332c]

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS  
PUBLISHERS — BOARD OF DIRECTORS  
1940 — 1959

1948

LOUIS BERNSTEIN  
SAUL H. BOURNE  
IRVING CAESAR  
FRANK CONNOR  
MAX DREYFUS  
DONALD GRAY  
JACK MILLS  
JOHN O'CONNOR  
(Term Expired 3/48)  
ABE OLMAN  
J. J. ROBBINS  
LESTER SANTLY  
GUSTAVE SCHIRMER  
HERMAN STARR

1950

LOUIS BERNSTEIN  
SAUL H. BOURNE  
IRVING CAESAR  
FRANK CONNOR  
MAX DREYFUS  
DONALD GRAY  
JACK MILLS  
ABE OLMAN  
J. J. ROBBINS  
LESTER SANTLY  
GUSTAVE SCHIRMER  
HERMAN STARR

1949

LOUIS BERNSTEIN  
SAUL H. BOURNE  
IRVING CAESAR  
FRANK CONNOR  
MAX DREYFUS  
DONALD GRAY  
JACK MILLS  
ABE OLMAN  
J. J. ROBBINS  
LESTER SANTLY  
GUSTAVE SCHIRMER  
HERMAN STARR

1951

LOUIS BERNSTEIN  
SAUL H. BOURNE  
IRVING CAESAR  
FRANK CONNOR  
MAX DREYFUS  
BERNARD GOODWIN  
DONALD GRAY  
JACK MILLS  
ABE OLMAN  
J. J. ROBBINS  
LESTER SANTLY  
(Term Expired 3/51)  
GUSTAVE SCHIRMER  
HERMAN STARR

[fol. 332d]

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS  
PUBLISHERS — BOARD OF DIRECTORS  
1940 — 1959

1952

LOUIS BERNSTEIN  
SAUL H. BOURNE  
IRVING CAESAR  
FRANK CONNOR  
MAX DREYFUS  
BERNARD GOODWIN  
DONALD GRAY  
JACK MILLS  
ABE OLMAN  
J. J. ROBBINS  
GUSTAVE SCHIRMER  
HERMAN STARR

1954

LOUIS BERNSTEIN  
SAUL H. BOURNE  
IRVING CAESAR  
FRANK CONNOR  
MAX DREYFUS  
BERNARD GOODWIN  
DONALD GRAY  
JACK MILLS  
ABE OLMAN  
J. J. ROBBINS  
GUSTAVE SCHIRMER  
HERMAN STARR

1953

LOUIS BERNSTEIN  
SAUL H. BOURNE  
IRVING CAESAR  
FRANK CONNOR  
MAX DREYFUS  
BERNARD GOODWIN  
DONALD GRAY  
JACK MILLS  
ABE OLMAN  
J. J. ROBBINS  
GUSTAVE SCHIRMER  
HERMAN STARR

1955

LOUIS BERNSTEIN  
SAUL H. BOURNE  
IRVING CAESAR  
FRANK CONNOR  
MAX DREYFUS  
BERNARD GOODWIN  
DONALD GRAY  
JACK MILLS  
ABE OLMAN  
J. J. ROBBINS  
GUSTAVE SCHIRMER  
HERMAN STARR



[fol. 332e]

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS  
PUBLISHERS — BOARD OF DIRECTORS

1940 — 1959

1956

LOUIS BERNSTEIN  
SAUL H. BOURNE  
IRVING CAESAR  
FRANK CONNOR  
MAX DREYFUS  
BERNARD GOODWIN  
DONALD GRAY  
JACK MILLS  
(Resigned 6/57)  
ABE OLMAN  
(Resigned 4/56)  
J. J. ROBBINS  
GUSTAVE SCHIRMER  
MAURICE SCOPP  
HERMAN STARR

1957

LOUIS BERNSTEIN  
SAUL H. BOURNE  
(Died 11/57)  
BONNIE BOURNE  
J. J. BREGMAN  
IRVING CAESAR  
FRANK CONNOR  
MAX DREYFUS  
BERNARD GOODWIN  
DONALD GRAY  
(Term Expired 3/57)  
JOHN D. MARKS  
JACK MILLS  
J. J. ROBBINS  
(Term Expired 3/57)  
GUSTAVE SCHIRMER  
MAURICE SCOPP  
HERMAN STARR  
ADOLPH VOGEL

1958

LOUIS BERNSTEIN  
BONNIE BOURNE  
J. J. BREGMAN  
IRVING CAESAR  
FRANK CONNOR  
BERNARD GOODWIN  
JOHN MARKS  
JACK MILLS  
GUSTAVE SCHIRMER  
MAURICE SCOPP  
(Term Expired 3/59)  
HERMAN STARR  
ADOLPH VOGEL

1959

LOUIS BERNSTEIN  
J. J. BREGMAN  
IRVING CAESAR  
FRANK CONNOR  
MAX DREYFUS  
BERNARD GOODWIN  
JOHN D. MARKS  
JACK MILLS  
MAURICE SCOPP  
GUSTAVE SCHIRMER  
HERMAN STARR  
RUDOLPH TAUHERT  
ADOLPH VOGEL

CABLE ADDRESS "SOUTHMUSIC"

SOUTHERN MUSIC PUBLISHING COMPANY, INC.  
1619 BROADWAY — AT FORTY-NINTH STREET  
NEW YORK 19, N. Y.

[Emblem]

September 8, 1959

Mr. Richard Murray  
American Society of Authors, Composers  
and Publishers  
575 Madison Avenue  
New York 21, New York

Dear Mr. Murray:

On Page 37 of Mr. Dean's remarks to the members of the Society on September 4th, he mentions there are four (4) publisher members not presently represented on the Board, who together, have enough votes to elect a member of the Board. I would appreciate very much if you could give me the names of those four (4) members.

Very truly yours,

/s/ J. L. LISTER  
J. L. Lister

JLL:zs